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# A Different and More Viable Theory of Equal Protection

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# A DIFFERENT AND MORE VIABLE THEORY OF EQUAL PROTECTION

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The multitude of equal protection cases of the last decade has been more than equaled by critical commentary upon them. This plethora of analysis is invited if not ordained by the ambiguity inherent in the term "equal protection." Obviously, not all unequal legislation is unconstitutional. Yet, as Professor Cox observed: "Once loosed, the idea of Equality is not easily cabined."[1] The purpose of this article is to suggest a general standard for the Court to apply in evaluating claims of unequal protection occasioned by a statute or administrative regulation treating one group less favorably than another.[2]

Any general theory of equal protection (or for that matter any clause of the Constitution) should be fairly attributable to the document from which it comes—the Constitution.[3] Thus, the equal protection clause should not be used as a peg upon which to hang desired social policy unless that policy is within the general purposes underlying the adoption of the clause.[4] In addition to being fairly attributable

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1. Cox, *The Supreme Court 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966).

2. This article is concerned only with those cases in which it is clear that one group is being treated less favorably than another, and the only question is whether the discrimination is justifiable. In recent years, many equal protection cases have involved questions of whether there is discrimination at all, for instance, separate schools according to gender, Vorcheimer v. School Dist., 430 U.S. 703 (1977) (mem.), performance tests for police officers that in fact exclude more blacks than whites, Washington v. Davis, 426 U.S. 229 (1976), exclusion of pregnancy from a state disability insurance scheme, Geduldig v. Aiello, 417 U.S. 484 (1974), and, of course, racial segregation, Brown v. Board of Educ., 347 U.S. 483 (1954). These cases are beyond the scope of this article.

3. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 949 (1973).

4. Judges who have written on the subject seem more willing to misuse the clause in this manner than are professors. *See, e.g.*, Craven, *Paean to Pragmatism*, 50 N.C.L. REV. 977, 988-89

to the Constitution, an ideal test should be susceptible to general application, or, in Professor Wechsler's words, it should announce a "neutral principle."[5] Before attempting to derive a general test from the Constitution, an examination of the concept of equal protection is in order.

The most significant characteristic of equal protection is that it focuses upon relative rather than absolute mistreatment. That is, a law does not violate equal protection because it treats *A* unfairly in the abstract. Rather, it can violate equal protection only if it treats *A* less favorably than *B*. Thus, one claiming a denial of equal protection is not saying to the state, "You cannot treat me this way because it is unfair." Instead, he is saying, "You cannot treat me this way because you treat *B* better." Therefore, when one's essential constitutional argument concerns abstract rather than relative unfairness, equal protection is an inappropriate basis for invalidating a statute. As basic as this principle is, the courts have not always recognized it.

A good illustration is *Massachusetts Board of Retirement v. Murgia*,[6] which involved a law mandating retirement at age fifty from the uniformed branch of the state police force. Officer Murgia argued that the actual or potential physical deterioration of one who has reached age fifty is not sufficient to mandate retirement. Therefore, he contended that he was denied equal protection by the disparity in treatment accorded him as opposed to a younger officer. A moment's reflection, however, suggests that the nub of Murgia's argument had nothing to do with the thirty or forty year old officers on the force. All parties conceded that the younger officers could be treated differently from older ones in regard to the intensity with which their physical fitness was scrutinized.[7] Thus, the Court should not have been concerned with

(1972); Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 791-92 (1971). However, it is hard to justify life-tenured judges creating rights that are not fairly implicit in the Constitution. Such action is unfortunately closely related to denying rights that are protected by the Constitution. *See* Loewy, *Abortive Reasons and Obscene Standards: A Comment on the Abortion and Obscenity Cases*, 52 N.C.L. REV. 223 (1973). This is certainly not to suggest that the Constitution is static or that judges can be replaced by computers. Limiting a constitutional provision, however, to the general purposes underlying its adoption hardly mandates a static or mechanical approach.

5. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

6. 427 U.S. 307 (1976).

7. For example, policemen under 40 were required to pass a physical examination only once every two years, whereas those between 40 and 50 were required to pass a more intense physical annually. *Id.* at 311.

It is clear that subjecting one group to more difficult means to obtain the same end as another group can constitute a denial of equal protection. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Hunter v. Erickson, 393 U.S. 385 (1969).

the propriety of treating fifty year olds differently from younger officers—that alone is not unconstitutional.

The question that should have concerned the Court is the abstract propriety of retiring a fifty year old officer, which is essentially a due process question. Arguably no harm was done by the Court's misanalysis since it did consider the justifications that led to the mandatory retirement law and concluded that they were reasonable.[8] Nevertheless, had the Court considered the case in due process terms, it would have had to reconcile *Cleveland Board of Education v. LaFleur*,[9] in which it held that due process forbids the automatic dismissal of school teachers who are five months pregnant. Just as Ms. LaFleur successfully argued that some school teachers are capable of teaching beyond five months of pregnancy, Officer Murgia could rightly contend that some uniformed officers are able to continue to work after age fifty. Although the cases are distinguishable, it would have been useful to have the Court's evaluation of the validity of the distinctions.[10]

In *Village of Belle Terre v. Boraas*,[11] excessive emphasis upon equal protection may have produced the wrong result. In that case, a local zoning ordinance permitted only single-family dwellings; the ordinance defined a family as any number of related people, but no more than two unrelated people living together in a single house. The litigation involved a six bedroom house that was rented to six unrelated college students in contravention of the ordinance. By a seven to one vote, the Court upheld the ordinance.

8. "Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective." 427 U.S. at 315.

9. 414 U.S. 632 (1974).

10. *Murgia* can be distinguished from *LaFleur* on at least four grounds. (1) By denying a physically capable pregnant school teacher the right to teach, the school board penalized the fundamental right of procreation. *See generally* Weinberger v. Salfi, 422 U.S. 749 (1975). (2) Since men cannot become pregnant, denying physically capable pregnant school teachers the right to teach arguably discriminates against women. *But cf.* Geduldig v. Aiello, 417 U.S. 484 (1974) (state disability program for private employees temporarily disabled from working held not violative of the equal protection clause even though it did not insure disability resulting from normal pregnancy). (3) There is greater difficulty in knowing for certain when an apparently overaged police officer is going to suffer a sudden attack than there is in regard to a teacher five months pregnant. Also, there is greater public danger involved if the police officer does suffer an attack. (4) Early retirement from the police force may be justified as a means of facilitating employment opportunities and promotions for younger men. *See* Ackerman, *The Conclusive Presumption Shuffle*, 125 U. PA. L. REV. 761, 799-800 (1977); *cf.* Schlesinger v. Ballard, 419 U.S. 498 (1975) (congressional statutory scheme providing longer tenure period for female naval officers was justified as providing women officers with fair and equitable career advancement programs and did not violate due process clause), *discussed in* text accompanying notes 91-97 *infra*.

11. 416 U.S. 1 (1974).

An examination of the Court's opinion, which rejected the equal protection challenge to the ordinance, is not very helpful, principally because there is almost no analysis to examine.[12] In Justice Marshall's more useful dissent[13] he finds that the ordinance impinged on the fundamental right of association, people related to one another were favored over those who were not, and there was no compelling need for this distinction since large families could create the same population density problems as large nonfamilies. Therefore, he concluded that the ordinance violated the equal protection clause.

Marshall's analysis could be countered in the following manner. Although both familial and nonfamilial people contribute to population density problems, they are not similarly situated. American society is built around the family, and caring for and taking in relatives is an American custom that the Village of Belle Terre may have wished to preserve.[14] In order both to preserve this ancient custom and at least somewhat to limit population density, it was necessary generally to limit the size of a household while making an exception for homes occupied exclusively by members of the same family.

Although the Court did not specifically address Marshall's analysis, it probably feared adopting a rule that would prevent a state or municipality from enacting a zoning ordinance favoring families. Yet, had the Court analyzed the problem as one of free association rather than equal protection, it could have invalidated the ordinance without intimating that families could never be given favored treatment. Without regard to families, any law that limits associational rights certainly should be no broader than is necessary for the effectuation of a legitimate state purpose.[15] The interest of people in living in the same house would seem to be within the ambit of the first amendment, especially when the people involved are college students who may view their living arrangements as a better method of exchanging ideas than would be available if they lived alone or with one roommate and were merely able to visit their desired housemates.[16] Because this first amendment

12. Mr. Justice Douglas wrote the majority opinion. *Id.* at 1. Mr. Justice Brennan, dissenting, did not reach the merits of the controversy because in his view the case was moot. *Id.* at 10 (dissenting opinion).

13. *Id.* at 12 (Marshall, J., dissenting).

14. *Cf.* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (housing ordinance that limited occupancy of a dwelling unit to members of a single family and recognized only a few categories of related individuals as a "family," and under which it was a crime for grandmother to have grandsons living with her, violated due process).

15. NAACP v. Alabama, 357 U.S. 449 (1958).

16. Indeed, this aspect of associational freedom is substantially closer to the core of the first

interest is more or less indirect, it presumably could be subordinated to a reasonable density control ordinance. Belle Terre, however, limited its residences to two unrelated persons per unit, which seems unreasonable when applied to a six bedroom house. Thus, the first amendment claim of Boraas probably should have prevailed, and Belle Terre should have been required to adopt legislation more precisely tailored to meet its density control objective.[17] Yet, because of the Court's insistence on treating *Belle Terre* as an equal protection case, it never came to grips with the first amendment issues.

Injudicious use of equal protection theory not only has contributed to the sustaining of apparently invalid statutes, but has led to the invalidation of other statutes on wholly specious grounds. For example, in *Eisenstadt v. Baird*,[18] a case that invalidated on equal protection grounds a Massachusetts law precluding the distribution of contraceptive devices to unmarried people, the Court said: "Whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike. If under *Griswold* [19] the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible."[20] The Court's logic would be impeccable if unmarried people enjoyed the same constitutional (or perhaps even statutory) right to engage in sexual intercourse that married people enjoy. However, the Court stopped short of so holding, and the right of a single person to engage in sexual intercourse remains in doubt.[21] Assuming,

amendment's guarantee of free speech than the penumbral right protected in Griswold v. Connecticut, 381 U.S. 479 (1965).

17. Examples would be limits of no more than one person (or if desired, one unrelated person) per bedroom, or no more than two cars per house.

18. 405 U.S. 438 (1972).

19. Griswold v. Connecticut, 381 U.S. 479 (1965), held that a married person could not be punished for using contraceptives while engaging in sexual intercourse with his or her spouse.

20. 405 U.S. at 453 (footnotes added).

21. In Griswold v. Connecticut, 381 U.S. 479 (1965), a majority of the Justices indicated that sex outside of marriage was not constitutionally protected—Justices Goldberg, Brennan, and Chief Justice Warren, *id.* (concurring opinion), Justice Harlan, *id.* (concurring opinion) (incorporating by reference his dissent in Poe v. Ullman, 367 U.S. 497, 533 (1961)), and Justice White, *id.* at 502 (concurring opinion). Of course Justices Black, *id.* at 507 (dissenting opinion), and Stewart, *id.* at 527 (dissenting opinion), did not even believe that married people had a constitutional right to contraceptive devices. *Cf.* Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976) (summary affirmance of three-judge district court decision that statute making sodomy a crime not unconstitutional as applied to consenting adults). *But cf.* Roe v. Wade, 410 U.S. 113 (1973) (finding qualified constitutional right of a single woman to terminate her pregnancy). As recently as June 9, 1977, the Court reiterated that it considers the question to be open. Carey v. Population Servs. Int'l, 431 U.S. 678, 691-96 n.17 (1977) (invalidating state law that prohibited distribution of contraceptives to anyone under 16 years old).

*arguendo*, that a single person does not have a right to engage in sexual intercourse, the fallacy of the Court's analysis becomes apparent. A married person needs a contraceptive device to prevent conception while engaging in lawful, constitutionally protected activity. An unmarried person, on the other hand, does not need a contraceptive device unless he intends to engage in an unlawful activity. Surely there is nothing invidious in drawing a distinction based on the legal ability to receive a product between those who might have a lawful use for the product and those who by definition cannot have a lawful use for it.[22] Therefore, whatever else may be wrong (be it constitutional defect or uncommon silliness [23]) with the Massachusetts anticontraceptive law, it should not have been found violative of the equal protection clause.[24]

*Murgia*, *Boraas* and *Baird* all illustrate the Court's tendency to overuse and thereby misuse the equal protection clause. One proposing a new and comprehensive theory of equal protection should be cognizant of this phenomenon and aim to confine consideration of equal protection to cases in which the problem really is one of invidious classification. While such a theory is not meant to return the equal protection clause to "the last resort of constitutional arguments,"[25] it is intended to stop employment of the clause as the automatic, and at times exclusive, resort of the Justices.[26]

A second aspect of the equal protection clause that needs exploration prior to proposing a general test is the purpose underlying the framers' adoption of the provision. Two points stand out with unusual clarity: first, the principal concern of the framers was to eliminate invidious racial discrimination;[27] second, the equal protection clause, unlike the fifteenth amendment, is not limited to "race, color, or previous condition of servitude."[28]As the late Professor Bickel said: "This cannot have been accidental."[29] Thus, it appears that the framers contemplated that racial discrimination might not be the only discrimination forbidden by the equal protection clause. On the other hand, they

22. The fact that a married person also has a potential unlawful use for the product, *i.e.*, adultery, is immaterial.

23. *See* Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

24. Much of the *Baird* faulty reasoning was repeated in Zablocki v. Redhail, 98 S. Ct. 673 (1978). For an outstanding critique, see *id.* at 683-84 (Stewart, J., concurring).

25. Buck v. Bell, 274 U.S. 200, 208 (1927).

26. *See* Zablocki v. Redhail, 98 S. Ct. 673, 683-84 (1978) (Stewart, J., concurring).

27. *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

28. U.S. CONST. amend. XV, § 1.

29. Bickel, *supra* note 27, at 60.

could not possibly have intended to invalidate all legislation that is in any way unequal, since that would be tantamount to invalidating practically all legislation.

History being what it is (or what a good law firm can make it appear to be[30]), it is doubtful that we can know exactly what the framers had in mind. However, from what we do know (that the framers were principally, but not exclusively, concerned with racial discrimination), we can glean a principle that can be fairly attributed to the framers: Laws that discriminate against racial minorities or groups sufficiently analogous to racial minorities to warrant distrust of a judgment made against them should be subject to strict judicial scrutiny.

Combining this principle with the need to limit equal protection to those cases that actually involve invidious classification, the author proposes the following test for ascertaining whether the equal protection clause has been violated:

> When the group discriminated against is sufficiently analogous politically to a racial minority to distrust legislative or administrative action discriminating against it, no such action shall be constitutional unless there is objective evidence of a nondiscriminatory purpose, and that evidence is sufficient to render it probable that the discriminatory effect was merely an incidental adjunct to the legitimate, nondiscriminatory purpose.

The remainder of this article will discuss the differences between the proposed test and the tests currently employed by the Supreme Court.

## GENERAL CONSIDERATIONS

The proposed test is substantially in accord with the concept of "suspect classifications." The test is couched in terms, however, that are directly traceable to the purpose of the equal protection clause, thus avoiding the criticism directed by Justices[31] and commentators[32] at the "suspect classification" concept as unwarranted judicial activism when employed outside the context of racial discrimination. To be sure, a certain amount of activism is inevitable in the application of the test, but this fact alone does not render a test unneutral or unprincipled.

30. *See* Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155-57.

31. Justices Rehnquist and Harlan in particular have been critical of the concept. *See* Trimble v. Gordon, 430 U.S. 762, 777-86 (1977) (Rehnquist, J., dissenting); Sugarman v. Dougall, 413 U.S. 634, 655-57 (1973) (Rehnquist, J., dissenting); Shapiro v. Thompson, 394 U.S. 618, 655-59 (1969) (Harlan, J., dissenting).

32. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 11-19 (1971).

Although Justices should not be Platonic Guardians,[33] neither should they be mindless computers. The proposed test is a viable compromise between these extremes.

An as yet unresolved ambiguity in the "suspect classification" test is whether discrimination against the members of a politically powerful group, for example, whites or men, is suspect. The proposed test takes the position that such discrimination is generally permissible because there is usually no reason to suspect a judgment made by a politically powerful group against itself. For example, in the paradigm case of *Regents of the University of California v. Bakke*,[34] there was simply no reason to believe that a group of white medical professors and/or administrators were "out to get" whites or were likely to be unjustifiably hostile toward the claims of whites.[35] The key word here is "unjustifiably," since the white committee *was* hostile toward Bakke's claim that minorities should not be favored because of their race. The justice of the competing claims, however, was not at all clear, neither side having a monopoly of truth, wisdom and righteousness on its side.[36] With the just solution so unclear, the only question should have been the bias of the decisionmaker and not the correctness of the decision. Since there was no reason to suspect the white committee of bias toward whites, its decision should have been allowed to stand.[37]

There is one exceptional type of circumstance, however, in which discrimination against a dominant political group may be suspect: when the classification, although nominally harmful to a dominant group, in fact proceeds on the assumption that a traditionally disfavored group is inferior. For example, if a law were to provide that a Caucasian employer shall be financially liable for all thefts committed by his Negro employees against third persons, the Caucasian employer

33. *See* L. HAND, THE BILL OF RIGHTS 73 (1958); Loewy, *supra* note 4.

34. Regents of the Univ. of Calif. v. Bakke, 98 S. Ct. 2733 (1978).

35. *See* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

36. *Compare* Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 52-53 (1977), *and* Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 682-92 (1975), *with* Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 7-19.

37. That a program favoring one minority, such as blacks, may incidentally disadvantage another minority, such as Jews, is immaterial. An otherwise qualified Jew who is displaced by a black is not denied admission because he is Jewish and not Christian. Rather, he is denied admission because he is white and not black.

Mr. Justice Powell unfortunately did not find the analysis expressed in text accompanying this note persuasive. 98 S. Ct. at 2751-53.

should be able successfully to challenge the law. Consider, also, the law inveighed against by Charles Dickens' Mr. Bumble, which provided that when a wife commits a crime in the presence of her husband the husband is the more guilty because the law supposes that the wife acted under the husband's direction. It will be recalled that Mr. Bumble exclaimed, "If the law supposes that, . . . the law is a ass—a idiot."[38] In fact, if the law supposes that, it is worse than an ass—it is an unconstitutional ass.[39]

The proposed test does not provide special equal protection scrutiny for laws that impinge upon fundamental rights. The reason for not so providing is that a right that is sufficiently fundamental to warrant special constitutional solicitude should be protected by some other provision of the Constitution. For example, the Court could and should have analyzed the *Boraas*[40] and *Baird* [41] cases in terms of the fundamental rights (association and privacy) involved in those cases rather than under the analytically extraneous equal protection clause. Similarly, in *Skinner v. Oklahoma*,[42] the fundamental nature of the right to procreate should have required a hearing prior to sterilization, without regard to whether a distinction between thieves and embezzlers was permissible.[43]

Occasionally, a statute involving a fundamental right will appear to be unconstitutional only because of the classification it makes. A surface analysis would suggest that such a statute creates an equal protection problem. For example, in *Police Department v. Mosely*,[44] the Court invalidated an ordinance prohibiting picketing near a school on the ground that bona fide labor disputes were excepted from the prohibition. The Court assumed *arguendo* that a ban on all picketing would have been permissible, but held that the equal protection clause forbade drawing a distinction based on the content of a picketer's message. Although the *Mosely* result is unobjectionable, use of the

38. C. DICKENS, THE ADVENTURES OF OLIVER TWIST (LONDON 1835), *quoted in* Califano v. Goldfarb, 430 U.S. 199, 223 n.10 (1977) (Stevens, J., concurring).

39. Assuming, of course, that women are sufficiently analogous politically to a racial minority to distrust legislative action against them. *See* text accompanying notes 55-62 *infra*.

40. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), *discussed in* text accompanying notes 11-17 *supra*.

41. Eisenstadt v. Baird, 405 U.S. 438 (1972), *discussed in* text accompanying notes 18-23 *supra*.

42. 316 U.S. 535 (1942).

43. Mr. Justice Stone favored this solution. *Id.* at 544 (concurring opinion).

44. 408 U.S. 92 (1972).

equal protection clause was not necessary to reach it. The first amendment normally forbids, or at least requires strong justification for, any law that discriminates among speakers on the basis of content.[45] Such a statute is proscribed because it regulates speech directly rather than merely regulating the time, place and manner of speech, not because it is unequal. A statute that forbids all picketing in front of a school, on the other hand, is not regulating content and therefore may not violate the first amendment. Once again, however, equal protection is essentially irrelevant.

The proposed test rejects the concept of "compelling state interest." That phrase is entirely appropriate in the context of the first amendment[46]—when one seeks to justify a law that would otherwise violate a clear mandate of the Constitution, it is not asking too much that a compelling interest be established to justify the law's existence. When, however, the question is dissipation of indicia of suspectness, the term "compelling state interest" is unclear at best and misleading at worst. Moreover, the Court has frequently employed the term in such a way that virtually no justification could meet the standard.[47] The Court's alternative term, "strict scrutiny," also fails to offer guidance concerning what factors the Court should look to in ascertaining the constitutionality *vel non* of the challenged law.

The proposed test focuses upon the precise factors the Court should consider in adjudicating an equal protection claim. If the basis of the equal protection challenge is the unjustifiably high risk that the decisionmaker (a legislature or administrative agency for example) is biased against the complaining group, the reviewing court ought to look for objective evidence that discrimination was not the purpose of the statute.[48] The test requires that this evidence be sufficient to render it probable that the discriminatory effect was merely an incidental

45. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

46. *See* NAACP v. Button, 371 U.S. 415 (1963).

47. In Dunn v. Blumstein, 405 U.S. 330 (1972), Chief Justice Burger lamented: "Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection." *Id.* at 363-64 (dissenting opinion). *But cf.* United States v. O'Brien, 391 U.S. 367 (1968) (government had a compelling interest in assuring availability of selective service certificates issued).

48. The term "objective evidence" refers to purposes that could justify the statute, whether the legislature thought of them or not. This is preferable to trying to ascertain the legislative motive, which is frequently mixed or unclear. Furthermore, as the Court has noted: "[T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body re-passed it for different reasons." Palmer v. Thompson, 403 U.S. 217, 225 (1971). *Compare* Abele v. Markle, 342

adjunct of the legitimate, nondiscriminatory purpose.[49]

Although mere invocation of the proposed test does not automatically answer every difficult equal protection question, it does provide a relevant and realistic framework for the Court.

## GENDER CLASSIFICATIONS

The Supreme Court's current rule in regard to gender based classifications is: "[T]o withstand constitutional challenge, [such classifications] must serve important governmental objectives and must be substantially related to achievement of those objectives."[50] The proposed test differs in that, first, it would not hold laws that discriminate against males to the same standard of justification as those that discriminate against females,[51] and second, it would require objective evidence of a nondiscriminatory purpose rather than evidence that the classification supports an important governmental objective.

The statutes involved in the gender classification decisions of the seventies can be divided into three basic categories: those that discriminate against women, those that discriminate against men, and those in which it is debatable upon which sex the discrimination is perpetrated. This article will first consider those cases involving discrimination against women—*Reed v. Reed*,[52] *Frontiero v. Richardson*[53] and *Stanton v. Stanton.*[54]

The initial question under the proposed test is whether women are sufficiently analogous politically to a racial minority to warrant distrusting a legislative or administrative decision that discriminates against them. Certainly some analogies can be drawn. Both have been the subject of derogatory and paternalistic stereotyping;[55] both

F. Supp. 800 (D. Conn. 1972), *with* Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972). Consequently, when there is objective evidence of a nondiscriminatory purpose, the Court should refrain from analyzing the sufficiency of that purpose on the ground that the legislature did not enact the law for that reason.

49. *See* Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689, 695 (1977).

50. Craig v. Boren, 429 U.S. 190, 197 (1976).

51. Looking at the Court's decisions discussed in this section vis-a-vis its rhetoric, one could argue that the Court has not always regarded laws discriminating against males with the same suspicion as laws discriminating against females.

52. 404 U.S. 71 (1971).

53. 411 U.S. 677 (1973).

54. 421 U.S. 7 (1975).

55. Even the Supreme Court has not been immune from the tendency to stereotype women:

> Man is, or should be, woman's protector and defender. The natural and proper timidity

have highly visible and virtually immutable[56] physical characteristics distinguishing them from the majority of the legislators. Indeed, in some respects women are more "discrete and insular"[57] than blacks: they were not guaranteed the vote until 1920;[58] they could not take up certain occupations until quite recently;[59] and until 1974 one of their number could be tried for murdering a member of the opposite sex before a jury from which members of her sex were systematically excluded.[60]

Although in some respects the analogy is imperfect,[61] when a predominantly male legislature or administrative agency enacts a law or regulation that in fact discriminates against women, in order for that law or regulation to pass constitutional muster it is not too much to require objective evidence of a nondiscriminatory purpose sufficient to render it probable that the discrimination is merely an adjunct to the

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> and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.
>
> . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873).

56. Transsexual operations are the exception.

57. The phrase, of course, is from Mr. Justice Stone's famous opinion in United States v. Carolene Products Co., 304 U.S. 144 (1938): "Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* at 153 n.4. There seems to be no significant difference between Stone's phrase "discrete and insular minority" and the phrase "sufficiently analogous politically to a racial minority to distrust a legislative or administrative action discriminating against it." Consequently these phrases will be employed interchangeably throughout the article. The proposed test is not couched in Stone's language because by emphasizing the political analogy to a racial minority, the relationship to the general purpose of the equal protection clause is made more apparent.

58. The 19th amendment was adopted in 1920. Prior to that, the Court had rejected the claim that women have a constitutional right to vote. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

59. *See* Goesaert v. Cleary, 335 U.S. 464 (1948). *Goesaert* was not officially disapproved until December 20, 1976, in Craig v. Boren, 429 U.S. 190, 210 n.23 (1976). *See also* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873). *Cf.* Muller v. Oregon, 208 U.S. 412 (1908) (state may restrict working hours of women).

60. *See* Hoyt v. Florida, 368 U.S. 57 (1961), *effectively overruled* in Taylor v. Louisiana, 419 U.S. 522 (1975).

61. Women do constitute a full 50% (and in many states, a majority) of the electorate. Thus, unlike blacks, if they are dissatisfied with the white male legislature, they can (at least theoretically) "throw the rascals out." In addition, their role as wives, mothers, sisters and daughters of male legislators gives them somewhat more political clout than blacks have with white legislators.

legitimate, nondiscriminatory purpose.[62]

*Reed v. Reed*[63] was a relatively easy case for a unanimous Supreme Court. Speaking through Chief Justice Burger, the Court addressed the question whether an Idaho law that favored males over females of the same degree of kinship in the appointment of administrators of decedents' estates comported with equal protection:

> We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.[64]

This deceptively simple ipse dixit masks a disturbing lack of analysis. To be sure, the male-favoring legislation is arbitrary in the sense that males are not always more qualified than females of equal kinship to administer an estate. It is not, however, arbitrary, in the sense of unreasonable or capricious, to maximize the number of estate administration contests resolved by general rule rather than specific litigation.[65] Indeed, if the Idaho statute had provided that when the contestants are equally related the older contestant shall prevail, it is doubtful that the Court would have invalidated the provision.[66] Yet, when administration contests are actually held, it is not unreasonable to believe that equally related males in fact prevail over females more frequently than equally related older people prevail over younger people.[67] The difference, of course, is that a legislative judgment that men should prevail

62. Since gender-based classifications were operative when the 14th amendment was adopted and the framers of the amendment did not perceive the analogy between blacks and women, one could argue that they intended to permanently allow such classifications. The difficulty with this argument is that it attributes too much specificity to a general clause in "a constitution intended to endure for the ages to come." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819). There is no apparent reason to attribute to the framers a desire to freeze human knowledge as of 1868. Consequently, if more than a century of learning has enabled us to perceive a previously unrecognized analogy, it is indeed better that our acceptance of it be late than never.

63. 404 U.S. 71 (1971).

64. *Id.* at 76-77.

65. *Cf.* Weinberger v. Salfi, 422 U.S. 749 (1975) (constitutionality of duration-of-relationship requirement for social security benefits upheld).

66. *Cf.* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (mandatory retirement for uniformed state police officer at age 50 upheld), *discussed in* text accompanying notes 6-10 *supra*; Oregon v. Mitchell, 400 U.S. 112 (1970) (state can set voting age at 21 years in local election contrary to Voting Rights Act).

67. Although the appointment of males in administration contests may sometimes result from prejudice against females, on other occasions the choice would be made because in our society the male often has more education and business experience.

over women is (to use Professor John Hart Ely's terms) a judgment that "we" are better than "they."[68]

Analyzing *Reed* under the proposed test, it is clear that the elimination of estate administration contests is a nondiscriminatory purpose. Whether it is sufficient to render it probable that the discriminatory effect was merely an incidental adjunct of the legitimate, nondiscriminatory purpose is a more difficult question. On balance, the legitimate purpose does not seem sufficient for two reasons: first, Idaho did not deem tie-breaking in estate administration disputes to be sufficiently important to provide for any less suspect classification, such as age; and second, the actual administrative inconvenience in holding a hearing to choose among contestants is relatively trivial.[69]

Of course, this analysis, unlike the Court's, would allow Idaho to enact legislation preferring women over men in the administration of estates. However, if a predominantly male legislature were to enact such a law, one could be reasonably certain that it really believed that administrative convenience was more important than ascertaining the best qualified administrator. Surely nobody would say that the legislature wanted to "put men in their place."[70]

*Frontiero v. Richardson*[71] invalidated a statute granting all married men in the uniformed services a spousal dependency allowance, but granting such an allowance to a woman only if she could establish that she provided her husband with more than half of his support. Under either the Court's test or the proposed test, the law obviously discriminates against women in that a man who does not provide more than half of his spouse's support gets the allowance anyway, whereas a similarly situated woman does not.[72] Administrative expense can hardly

68. Ely's "we-they" theory is most fully developed in Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237, 1245-58 (1974). *See also* Ely, *supra* note 35, at 727-36.

69. *See* Califano v. Goldfarb, 430 U.S. 199, 235 (1977) (Rehnquist, J., dissenting). Indeed, before *Reed* reached the Supreme Court, Idaho had enacted prospective legislation abolishing the challenged legislation. Law of Mar. 12, 1971, ch. 111, § 1, 1971 Idaho Gen. Laws 233 (codified at Idaho Code § 15-3-203 (Cum. Supp. 1977)). Inasmuch as this prospective legislation was enacted subsequent to the commencement of the *Reed* suit, it is possible that it may have been motivated partially by constitutional as opposed to policy reasons. Nevertheless, Idaho's decision not to await the outcome of the litigation suggests that it did not consider retention of the gender-based classification necessary.

70. Arguably, one could contend that such a statute would reflect a desire on the part of the male legislators to retain their jobs with their female constituents. It is highly unlikely, however, that a legislator would perceive support of such a statute to be politically beneficial. The statute would alienate nearly all men in addition to those women who believe in equality. Thus, it is not surprising that no such statutes appear to exist.

71. 411 U.S. 677 (1973).

72. The discrimination was particularly acute in Lieutenant Frontiero's case in that she was

justify the statute, because the cost of ascertaining actual dependency surely could not exceed the amount of support money expended on servicemen with nondependent wives.[73] Furthermore, the incremental cost of extending a dependency allowance to all married servicewomen would not have been substantial since women only constituted about one percent of the service personnel.[74]

The only possible basis for sustaining the statute is that a husband usually has a legal duty to support his wife, whereas a wife does not as frequently have a duty to support her husband.[75] The statute might be analogized to one that provides a dependency allowance for those who are either legally obligated to support or are in fact supporting a spouse. The difficulties with this argument are that some support statutes are sex neutral,[76] and support laws do not require furnishing more than half the support of the other spouse. Thus, if Lieutenant Frontiero had been under a duty to support similar to the one imposed on a man, the less-than-half support she provided her husband would have discharged that duty. Therefore, there appears to be no objective evidence of a nondiscriminatory purpose sufficient to render it probable that the discrimination against servicewomen was merely an incidental adjunct to a legitimate nondiscriminatory purpose.

*Stanton v. Stanton*[77] involved a Utah statute providing for the attainment of majority at age eighteen by females, but at age twenty-one by males. Specifically at issue was a Utah court order pursuant to the statute requiring a father to support his daughter until age eighteen and his son until age twenty-one.[78] If the statute had merely provided for extended support entitlement for males vis-a-vis females, this would have been a clear case of lawful discrimination.[79] By providing that females attained their majority at eighteen, however, the legislature

earning $443.70 per month, completely supporting herself and contributing $149 to her husband's support. However, because her husband was receiving veteran's benefits of $205 per month, he was not technically her dependent. *Id.* at 680 n.4.

73. This is particularly so since a wife who, like Lieutenant Frontiero's husband, furnishes slightly more than 25% of the total family income normally would not be a dependent. *See* Califano v. Goldfarb, 430 U.S. 199, 203 n.3 (1977).

74. 411 U.S. at 681.

75. *See* Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1180 (1974).

76. *See, e.g.*, COLO. REV. STAT. § 14-6-101 (1973).

77. 421 U.S. 7 (1975).

78. According to Mr. Justice Rehnquist, it was unclear whether or not the Utah court order was pursuant to the statute. 421 U.S. at 19-20 (Rehnquist, J., dissenting).

79. The Utah Supreme Court observed that "it is a salutary thing for [a male] to get a good education and/or training before he undertakes [the responsibility of providing a home for his family]." Stanton v. Stanton, 30 Utah 2d 315, 319, 517 P.2d 1010, 1012 (1974). The enactment by

was permitting them to make binding contracts at an earlier age and generally to be treated as mature persons prior to males.[80] In one sense then the legislation seems far from being suspect since one could contend that legislatures normally think of minorities as requiring more, not less, maturation time.[81] Nevertheless, it appears the Supreme Court rightly invalidated the age differential in the support provisions of the statute.[82] The impact of the less-than-equal-support provision is clearly detrimental to women; indeed, it handicaps them in obtaining the very thing they need most to achieve parity with men—a college education.[83] Thus, the predominantly male legislature appears to have taken more from women than it gave them in terms of preparation for life. In fact, even the earlier statutory maturation age may be the result of a stereotype that women mature as much as they are going to by age eighteen while men continue to mature until age twenty-one. Thus, the *Stanton* result seems correct.

*Craig v. Boren*[84] also involved a sex-age classification, but this time the discrimination was against males. The Oklahoma statute in issue provided that females could buy 3.2% beer at age eighteen whereas males could not until age twenty-one. The Supreme Court, relying on *Stanton* and *Reed*, held that this statute violated the equal protection clause. The proposed test rejects this result.

It is quite signficant that the sex-age distinction at issue was the only one that the Oklahoma legislators chose to retain in 1972 when, pursuant to a federal court of appeals decision,[85] the legislature sex-neutralized its age of majority laws. Objectively, the retention of the

a predominantly male legislature of a law that has as its apparent purpose the perpetuation of male domination or female subservience creates a classic case of unequal protection.

80. Some aspects of Utah law were sex neutral as to age of majority, however: every citizen satisfying residency requirements could vote at the age of 21; every citizen 21 years of age could serve as a juror, be admitted to the practice of law, and serve as an incorporator so long as such person met nonsex requirements; no one, male or female, could purchase tobacco if under 19 years of age; motor vehicle licenses were issued with respect to age only; juvenile court jurisdiction applied to males and females under a certain age; and every person 18 years of age or older could make a will. 421 U.S. at 15-16.

81. For example, it is virtually unthinkable that a predominantly white legislature would provide that blacks are *sui juris* at 18 whereas whites must wait until 21.

82. It did not invalidate any of the other gender-based age of majority differentials in the Utah statute. However, it is doubtful that any of them can survive Craig v. Boren, 429 U.S. 190 (1976), *discussed in* text accompanying notes 84-86 *infra*.

83. *Cf.* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (requirement that black graduate student be physically segregated struck down as detrimental to his education); Sweatt v. Painter, 339 U.S. 629 (1950) (separate Texas law school for black students held substantially unequal to law school for whites).

84. 429 U.S. 190 (1976).

85. Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972).

statute was understandable since the facts showed that more than ten times as many men as women aged eighteen to twenty were arrested for driving under the influence of alcohol.[86] Since the legislation did not discriminate against a politically powerless group,[87] was reenacted at a time when the legislature reevaluated all and eliminated all other sex classifications, and is supported by objectively valid reasons, there is no reason to suspect the legislature of being unjustifiably hostile toward young men. Therefore the legislation should have been sustained.

*Califano v. Webster*,[88] which upheld a statute rendering women eligible for social security benefits at an earlier age than men,[89] was clearly correct. The discrimination was against men, not women. The apparent rationale of the statute was to compensate women for past job discrimination that resulted in lower paying jobs than men. As the Supreme Court indicated, there is nothing suspicious about this judgment. Indeed, prior to the initiation of this law suit, Congress had prospectively reduced the eligibility age for men to that for women,[90] thereby demonstrating that a dominant political group is not likely to perpetuate unfair discrimination against itself.

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86. 429 U.S. at 201 n.8. These figures do not necessarily suggest that 3.2% beer, as compared with more potent alcoholic beverages, causes the higher incidence of driving under the influence among young men. However, a legislature might reasonably conclude that allowing young men to purchase 3.2% beer might exacerbate this already unfortunate situation. Consequently, it is difficult to fathom Mr. Justice Stewart's conclusion that "[t]he disparity created by these Oklahoma statutes amounts to total irrationality." *Id.* at 215 (Stewart, J., concurring). To be sure, some legislators may have voted for this classification for less noble motives. For example:

> A 1973 legislative attempt to equalize the age-sex reservation for beer also failed because of sectarian opposition. The principal preacher appearing to oppose age-sex equalization for beer testified that its retention was necessary to preserve young men from the "pool, beer, and girls" syndrome. See article, "Committee Votes to Adjust Legal Beer-Buying to Age 19", Tulsa Tribune, Tuesday, February 13, 1973, page one. (Although the exposure of young women to pool, beer and *men* did not appear to pose any theological problems.)

Brief for Appellant at 11 n.2, Craig v. Boren, 429 U.S. 190 (1976). However, as a colleague of mine astutely observed: "If legislation could be invalidated because some jackass voted for it for the wrong reason, there would be very few valid laws on the books." See note 48 *supra*; *cf.* Palmer v. Thompson, 403 U.S. 217(1971) (no denial of equal protection when city closes swimming pools, claiming pools could not be operated safely on an integrated basis). *See generally* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

87. Even if young men could be conceptualized as a politically powerless group, there is no reason to think that they are more powerless than young women. While most of the legislators are currently not young men, they were *never* young women.

88. 430 U.S. 313 (1977).

89. The age of eligibility was 62 for women and 65 for men.

90. "[T]he number of an individual's elapsed years is the number of calendar years after 1950 . . . and before the year in which he died, or if it occurred earlier but after 1960, the year in which he attained age 62." Social Security Act of 1935, Pub. L. No. 74-271, § 215, 49 Stat. 620 (formerly codified as amended at 42 U.S.C. § 415(b) (1970)) (amended 1972). The statute did not apply to Webster, who turned 65 in 1974.

*Schlesinger v. Ballard*[91] upheld a federal statute terminating a male Navy lieutenant's service after he was twice considered and rejected for promotion.[92] Lieutenant Ballard argued that this statute denied him equal protection because he was discharged after nine years in rank, whereas a female lieutenant could not be discharged until she had completed thirteen years in rank.[93] The Court upheld the discrimination as justifiable compensation to women for their relative lack of opportunity for promotion. Mr. Justice Brennan, for the four dissenters, argued that congressional inadvertence rather than intentional compensatory motives was responsible for the statute. He also expressed doubt about the propriety of justifying one gender based classification upon another. Finally, he concluded that since the government conceded that this gender based classification was no longer needed, it could hardly be found to serve an overriding or compelling governmental interest.[94]

The proposed test would reject Brennan's analysis and reach a result in accord with the majority. First, since the particular discrimination at issue was against men, there is no reason to apply any form of strict scrutiny to the classification. Second, by noting the relative difficulty that women have in achieving promotion, the Court is not approving that discrimination; it is simply observing that compensatory legislation should not be invalidated. In addition, the examination of

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91. 419 U.S. 498 (1975).

92. (a) Each officer on the active list of the Navy serving in the grade of lieutenant, except an officer in the Nurse Corps, and each officer on the active list of the Marine Corps serving in the grade of captain shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander or major for the second time. However, if he so requests, he may be honorably discharged at any time during that fiscal year.

. . . .

(d) This section does not apply to women officers appointed under section 5590 of this title or to officers designated for limited duty.

10 U.S.C. § 6382 (1976).

93. (a) Each woman officer on the active list of the Navy, appointed under section 5590 of this title, who holds a permanent appointment in the grade of lieutenant and each woman officer on the active list of the Marine Corps who holds a permanent appointment in the grade of captain shall be honorably discharged on June 30 of the fiscal year in which—

(1) she is not on a promotion list, and

(2) she has completed 13 years of active commissioned service in the Navy or in the Marine Corps.

However, if she so requests, she may be honorably discharged at any time during that fiscal year.

10 U.S.C. § 6401 (1976).

94. 419 U.S. at 511-21 (Brennan, J., dissenting).

actual motives tends to be a fruitless endeavor—neither Brennan's evidence that the discrimination was inadvertent[95] nor the Court's evidence that it was intentional[96] is compelling.[97] Finally, the strongest justification for *Ballard* is that, overall, men are not obviously treated less favorably than women. While Lieutenant Ballard can be discharged four years earlier than a woman for nonpromotion, he is guaranteed the right during this shorter period to be twice considered for promotion. A woman lieutenant has no such right. Although for thirteen years she cannot be discharged for lack of promotion, there is no guarantee that during that time she will be considered for promotion. Whether her situation is better than that of Lieutenant Ballard is, to say the least, debatable. Since a predominantly male Congress enacted this classification, the Court rightly rejected Lieutenant Ballard's challenge.

*Weinberger v. Weisenfeld*[98] involved a provision of the Social Security Act granting benefits to a widow from her deceased husband's social security insurance if she had minor children and little or no income,[99] without granting comparable benefits to a similarly situated widower. To some extent, the issue seemed to be whether the discrimination was against surviving widowers or deceased female social security contributors. Concluding that the discrimination was against women social security contributors, the Court, relying on *Frontiero*, struck down the statute.

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95. The number of years selected for women line lieutenants, 13, corresponded exactly to the normal number of years Congress intended to precede separation for a male officer not chosen for promotion. Thus, Congress' original purpose in enacting slightly different separation provisions for men and women is quite certain to create the *same* tenure in years for women lieutenants as for the average male lieutenant before involuntary separation was permitted.

However, for reasons not entirely clear upon the record in this case, the promotion zone system for men did not, as administered by the Navy, result in the normal 13-year tenure for men . . . .

*Id.* at 513 (Brennan, J., dissenting).

96. "When it enacted legislation eliminating many of the former restrictions on women officers' participation in the naval service in 1967, Congress expressly left undisturbed the 13-year tenure provision of § 6401. And both the House and the Senate Reports observed that the attrition provisions governing women line officers would parallel present provisions with respect to male officers *except that the discharge of male officers probably occurs about 2 years earlier.*"

*Id.* at 505 (quoting S. REP. No. 676, 90th Cong., 1st Sess. 12 (1967); H.R. REP. No. 216, 90th Cong., 1st Sess. 17 (1967)).

97. This, of course, is not surprising since evidence of subjective legislative motive is usually doubtful. *See* United States v. O'Brien, 391 U.S. 367, 383-84 (1968); Kelly, *supra* note 30. *See generally* Ely, *supra* note 48.

98. 420 U.S. 636 (1975).

99. 42 U.S.C. § 402(g) (1970 & Supp. V 1975).

The proposed test would produce the same result. At one level, of course, the statute discriminates against widowers. However, it is somewhat reminiscent of Mr. Bumble's exasperation with the law.[100] Just as a husband should not be held liable for his wife's crime simply because a predominantly male legislature (or judiciary) presumed she was following his orders, he should not be denied social security benefits simply because a predominantly male Congress decided that a widow with children ought to have the option to remain in "her place," the home, whereas a man, even a widower with children, should get out and work.

*Califano v. Goldfarb*[101] presented an issue similar to *Weisenfeld*. Under a different provision of the Social Security Act, a sixty year old widow of a man insured under social security was automatically entitled to certain benefits, while a widower of a similarly insured woman was entitled to such benefits only if he could establish that his wife had provided him with more than half of his support.[102] *Weisenfeld* was distinguishable because in that case a widower could never get benefits, whereas in *Goldfarb* he could get benefits if he could establish dependency. Nevertheless, a four-Justice plurality concluded that, as in *Frontiero*, the requirement of proving dependency unconstitutionally discriminated against women. Justice Stevens concurred on the ground that the provision unconstitutionally discriminated against men.[103] Stevens and the four dissenters distinguished *Frontiero* on the ground that social security payments are not really a form of compensation.[104]

Like Stephen Weisenfeld, however, Leon Goldfarb appears to be the victim of a male chauvinist attitude that men upon their deaths should always provide for their wives, whereas women, being the weaker sex, are under no such obligation. The equal protection clause should deny a politically dominant group the power to enact legislation perpetuating such a stereotype.[105]

100. *See* text accompanying note 38 *supra*.

101. 430 U.S. 199 (1977).

102. 42 U.S.C. § 402(f)(1) (1970) (surviving husband); *id.* § 402(e)(1) (1970) (surviving wife).

103. 230 U.S. at 217-224 (Stevens, J., concurring).

104. *Id.* at 217 n.1 (Stevens, J., concurring), 228-29 (Rehnquist, J., dissenting, joined by Burger, C.J., Stewart and Blackmun, J.J.).

105. If a consequence of this reasoning is that a statutory forced share provided for a woman but not a man from the estate of the deceased spouse is unconstitutional, so be it.

*Kahn v. Shevin*,[106] which upheld a Florida statute granting a property tax exemption to widows but not widowers, is under the proposed test the most difficult of the gender based classification cases. In some respects, the classification is very much like those later invalidated in *Weisenfeld* and *Goldfarb* in that the male-dominated legislature is arguably saying that becoming a widow entails greater loss than becoming a widower. This conclusion is buttressed by the statutory provision that grants the exemption to "every widow or person who is blind or totally and permanently disabled."[107] The predominantly male legislature determined that one who has lost the use of his or her eyes or body, or has lost a male spouse, is entitled to a tax exemption. However, a person such as Mr. Kahn, who has "merely" lost a female spouse, is not so entitled. Despite these indicia of legislative stereotyping, the Court in *Kahn* probably reached the correct result. Unlike the benefits in *Weisenfeld* and *Goldfarb*, the *Kahn* exemption does not depend upon the contribution of the deceased spouse—a widow gets the tax exemption whether her husband was a taxpaying citizen all of his life or a worthless bum. Therefore, the Florida legislation cannot meaningfully be said to discriminate against the late Mrs. Kahn. Rather, it clearly discriminates against men.

It can still be argued that the statute has an impermissible chauvinistic protectionist purpose rather than a permissible compensatory one. If it were truly designed to compensate women for a discriminatory job market, one would expect it to apply to all women, not merely widows.[108] Florida, however, could surely decide that a tax exemption should be limited to people who have suffered the loss of something such as sight, body use or a spouse. If the state can allow those who have lost a spouse to be treated differently from those who have not, a judgment that widows tend to face greater economic discrimination than widowers in the job market seems to be sufficient objective evidence of a nonchauvinistic[109] purpose to warrant upholding this statute.

106. 416 U.S. 351 (1974).

107. "Property to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation." FLA. STAT. ANN. § 196.202 (Harrison 1974).

108. *See* Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 5 n.29.

109. When concerned with a situation in which the alleged denial of equal protection is premised on stereotyping a discrete and insular group in such a way that legislation redounds to the detriment of some members of the more politically dominant group, the word "nonchauvinistic" seems more appropriate than "nondiscriminatory."

In sum, if the Court were to adopt the proposed test, its results in the area of gender based discrimination would not change significantly. Indeed, only one of the nine cases discussed above, *Craig v. Boren*, would have been decided differently. Nevertheless, besides being closer to the general purpose of the equal protection clause, the proposed test would give legislatures a clearer idea than they currently have regarding the kinds of statutes they should avoid enacting.

## ILLEGITIMACY

In some respects, illegitimacy is not analogous to racial minority status. An illegitimate, unlike a black or a woman, does not look any different from the majority of legislators. Furthermore, antibastard legislation is not pervasive, but has been limited to treating the illegitimate less well than his legitimate half-sibling only in regard to parental obligations and third-party or governmental obligations predicated upon an injury to or incapacitation or death of a parent. Laws that discriminate against corporations because its incorporators or officers are illegitimate[110] or laws that mandate separate schools for illegitimates[111] simply have not been part of the American scene.

Nevertheless, in some respects illegitimates very nearly constitute the paradigmatic discrete and insular minority. No group is politically weaker; nobody carries signs in a parade reading "Bastard Power"—very few would proudly proclaim, "I am a bastard." The status of illegitimacy is immutable, at least from the illegitimate's perspective;[112] it is an accident of birth over which the illegitimate has no control. Thus, when the legislature imposes special disadvantages upon this group, there ought to be objective evidence of a legitimate nondiscriminatory purpose sufficient to render it probable that the discrimination was merely an incidental adjunct to a legitimate purpose, rather than an attempt to heap additional disadvantages upon the illegitimate.[113]

110. "[W]ould a corporation, which is a 'person,' for certain purposes, within the meaning of the Equal Protection Clause (Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189) forego recovery for wrongs done its interests because its incorporators were all bastards?" Levy v. Louisiana, 391 U.S. 68, 71 (1968).

111. *See* Brief for Executive Council of the Episcopal Church in the U.S.A. and the American Jewish Congress as Amici Curiae at 13-14, Levy v. Louisiana, 391 U.S. 68 (1968). *See* Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338, 342 n.17 (1969).

112. Of course, his parents can sometimes change his status.

113. Some of the disadvantages suffered by illegitimates include a tendency to be lower in

When the law treats an illegitimate less favorably than his legitimate half-sibling in his relations with his mother, the discrimination is rarely if ever justified. The problem of proof, with the concomitant potential for fraud, that can occur when an illegitimate claims that a particular individual is his father cannot occur in regard to his mother. Indeed, most states do not discriminate against an illegitimate in regard to his relationship with his mother.[114] In the only Supreme Court case involving such discrimination, *Levy v. Louisiana*,[115] the Supreme Court invalidated a Louisiana law that granted a wrongful death remedy to the legitimate children of a woman killed by a tortfeasor but denied such a remedy to the woman's illegitimate children. Under the proposed test, *Levy* was clearly correct. There is no basis for the statute other than the desire to treat illegitimates less favorably than legitimates. To some, in view of the importance of traditional families, this basis alone might seem sufficient. The distinction made by such a law, however, is not between types of living arrangements[116] but between classes of children, and the bare desire to relegate an illegitimate to an inferior status is precisely the sort of thing that the equal protection clause was designed to obliterate.

An illegitimate's rights in regard to his father present more problems. One of the most basic needs of the illegitimate is financial support. Most states have chosen to hold fathers responsible for the support of their illegitimate children. Often, however, such statutes owe their existence not to the altruistic ideal that all children should enjoy the support of their father, but to the less noble concern that it is better for fathers to feed their illegitimate offspring than for taxpayers to be saddled with that responsibility.[117]

The Texas legislature chose not to enact such a statute, and thus, in Texas, a legitimate child was legally entitled to paternal support while an illegitimate child was not. In *Gomez v. Perez*,[118] the Court

general knowledge, oral ability, creativity, perceptual development, reading attainment and arithmetical skills. *See* Pringle, *Born Illegitimate—Born at a Risk*, 18 J. PSYCHOSOMATIC RESEARCH 229 (1974).

114. For example, "[a] child born out of wedlock . . . inherit[s] from his mother in all states." E. SCOLES & E. HALBACH, PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 57 (1973).

115. 391 U.S. 68 (1968).

116. *E.g.*, New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973), *discussed in* text accompanying notes 142-43 *infra* .

117. "The legislation is social in nature and was enacted to prevent illegitimates from becoming public charges. The benefit to the child is incidental." Allen v. Hunnicutt, 230 N.C. 49, 51, 52 S.E.2d 18, 19 (1949).

118. 409 U.S. 535 (1973).

rather summarily invalidated this classification by holding that an illegitimate child was entitled to support from his father. Although this result has much surface logic, it seems that in fact the case was wrongly decided. While one should be suspicious of a legislative judgment disfavoring illegitimates, such suspicion should not extend to a judgment that taxpayers rather than fathers must support the child. After all, men who father illegitimate children whom they refuse to support may be less popular with the legislature than the illegitimates themselves.[119] Thus, it would seem that the legislature would not continue to exempt such fathers from their support obligations without a good reason for doing so. In short, unlike other discrimination against illegitimates, this type of discrimination does not appear to be the kind that needs special protection from the majoritarian process.[120]

Intestate succession is an area in which the illegitimate's relationship to his father has been a constant source of litigation. When the relationship has not been established prior to the putative father's death, there is good reason to uphold state statutes excluding the illegitimate from claiming as a child of the deceased—estates would be difficult to finalize if an alleged illegitimate child could establish his claim at any time.[121] Although this problem can be substantially ameliorated

119. This is not to suggest that fathers of illegitimates are analogous politically to a racial minority. They differ in that they are largely responsible for their situation. *See* text accompanyingnotes 136-41 *infra*.

120. Objectively speaking, why would a legislature exempt illegitimate fathers from their duty to support? One possible reason is the danger of the wrong person being found to be the father. Scientific tests cannot establish paternity to a certainty; they can merely disprove it in certain cases. Furthermore, juries tend to find paternity when the defendant can afford to support the child, sometimes even when the evidence is to the contrary. *See, e.g.*, Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P.2d 442 (1946). Such a finding tends to socially stigmatize the defendant, who may or may not deserve the stigma. A legislature that does not impose a duty of support on the father of an illegitimate might be effectively saying that it is more important to prevent the possibility of misidentification and accompanying stigma than it is to ensure paternal support. Although many would not agree with this ordering of priorities, it seems sufficiently substantial to render it probable that the discrimination against the illegitimate was merely an incidental adjunct of a legitimate nondiscriminatory purpose.

Of course, if the putative father had formally acknowledged the child there would not have been a danger of misidentification, and there would be no quarrel with the *Gomez* result. Indeed, had the putative father been living with the mother in a monogamous relationship for several weeks surrounding the conception of the child, the result might have been justified. This was not the case, however. *See* text accompanying notes 131-36 *infra*.

This analysis of *Gomez* does permit a gender based classification since mothers of illegitimates are obligated to support them. However, the gender classification is sustainable, principally because the danger of misidentification, which justified exempting fathers, is not applicable in regard to mothers.

121. *See, e.g.*, Jerry Vogel Music Co. v. Edward B. Marks Music Corp., 425 F.2d 834 (2d Cir. 1969).

by a statute of limitations on heirship claims,[122] no similar remedy is available for intentional or unintentional misidentification. This problem is magnified when the putative father is not available to present his side of the case and can be posthumously and defenselessly stigmatized as the father of an illegitimate.

When fatherhood has been established prior to the decedent's death, these considerations are not so significant. Particularly when the father has acknowledged the child as his own there seems to be no justifiable rationale for disinheritance. Yet in *Labine v. Vincent*,[123] the Court upheld a Louisiana statute that mandated disinheritance of a paternally acknowledged illegitimate who had lived with and been supported by her father all of her life. This and other provisions of the Louisiana statute were so Draconian in their treatment of illegitimates as to preclude the possibility that they were intended to do anything other than "put the bastard in his place."[124] Consequently, the Court should have invalidated the statute.

*Trimble v. Gordon*,[125] which involved an attempt by an Illinois illegitimate to inherit the estate of the man who while living had been judicially declared to be her father, effectively overruled *Labine*. *Trimble* was actually a weaker case for the illegitimate since paternity had been established by judicial proceeding rather than formal acknowledgment.[126] Nevertheless, if Illinois was satisfied with the determination of paternity for support purposes, that determination should have been valid for inheritance purposes also.[127]

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122. *See, e.g.*, N.C. GEN. STAT. § 29-19(b) (Cum. Supp. 1977).

123. 401 U.S. 532 (1971).

124. "Natural fathers and mothers can, in no case, dispose of property in favor of their adulterine or incestuous children, unless to the mere amount of what is necessary to their sustenance, or to procure them an occupation or profession by which to support themselves." LA. CIV. CODE ANN. art. 1488 (West 1952).

125. 430 U.S. 762 (1977).

126. Thereafter the father openly, but apparently not formally, acknowledged the child as his own. *Id.* at 764.

127. It could be argued, however, that since Mr. Gordon did not formally acknowledge his child during his lifetime and even had to be judicially ordered to support her, he would prefer that she not inherit his estate. Although this may be true, it would not seem sufficient to justify the statute. When an individual desires to discriminate against a "discrete and insular minority," he must do so on his own, not with the aid of the state. McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637, 641-42 (1950); *cf.* Shelley v. Kraemer, 334 U.S. 1, 13-14 (1948) (condemning racially restrictive covenants in private real estate sales). Thus, if Sherman Gordon wished to discriminate against his illegitimate daughter, he should have been required to make a will (as indeed he was required to do under the Court's decision). Although the Court appeared to adopt this analysis, *see* 430 U.S. at 775 n.16, it purported to leave the question open on the ground that effectuating the intestate's presumed intent was not the purpose of the statute. In so doing, the Court improperly refused to evaluate this claimed justification. A statute should be upheld when there is a valid justification for it, whether or not the legislature enacted it for that

Logically, the next question is whether anything other than acknowledgment or adjudication can suffice for invalidating discriminatory treatment of an illegitimate in relation to his father. The strongest possible case for such a holding was *Weber v. Aetna Casualty Co.*,[128] in which the illegitimate child had lived with her father and mother since birth in a household that also included the father's four legitimate children. Upon the father's death in a work-related injury, Louisiana law deprived the unacknowledged child of compensation because the funds were exhausted by the legitimate children, whose claims by law were satisfied first. Moreover, the child could not have been acknowledged because of a Louisiana law that forbade acknowledgment while the father was married to someone other than the child's mother.[129] Of course, the decedent had never been adjudicated the child's father since his willing support of the child since birth precluded the necessity of such a determination. The Court emphasized that only *dependent* children could recover compensation and concluded that proof-of-paternity problems were not significant, apparently because men do not normally voluntarily support other men's children. Thus, it rightly invalidated the Louisiana statute.[130]

*Mathews v. Lucas*,[131] which involved a federal statute providing social security benefits to all legitimate minor children of a deceased insured, but denying such benefits to some illegitimate children, was a much more difficult case. The statute certainly did not appear to be one calculated to "put the bastard in his place." It allowed benefits to illegitimate children who were in fact dependent upon the insured at the time of his death or were living with him at that time. Even absent this dependency, an illegitimate could obtain benefits if his parents had

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reason. Otherwise, the legislature could simply reenact the law for constitutionally valid reasons. *See* note 48 *supra*.

One might argue that the decision should have been prospective since, at the time of his death, Gordon might have believed that it was unnecessary to make a will in order to disinherit his daughter. However, it does not seem unjust to compel one who relies on intestacy laws to assume the risk of their changing in one way or another.

128. 406 U.S. 164 (1972).

129. At the time of his death, the father was married to a woman who was confined to a mental institution and was the mother of his four legitimate children.

130. The litigation also involved a bastard born after the putative father's death. According to the Court: "[A] posthumously born illegitimate child should be treated the same as a posthumously born legitimate child . . . ." 406 U.S. at 169 n.7. For the reasons presented in the discussion of *Gomez v. Perez*, note 120 *supra*, the proposed test would not normally require that identity of treatment. In *Weber*, however, this result may have been justified because of the lengthy monogamous relationship between the mother and the putative father. See the discussion of *Mathews v. Lucas* in text accompanying notes 131-134 *infra*.

131. 427 U.S. 495 (1976).

gone through a marriage ceremony that was invalid because of a non-obvious defect, or if the father had acknowledged the child in writing or had been decreed the child's father by a court. Finally, the child could be entitled to benefits if he were eligible to inherit from his father under state law.[132] *Lucas* involved an unmarried couple that lived together between 1948 and 1966. During this time the couple had two children, whom the father supported and orally acknowledged as his own. The couple separated in 1966, and the father died two years later. The Supreme Court held that the children were not denied equal protection on the ground that the statute seemed closely tailored toward assuring that all dependent children would recover benefits. The fact that, unlike the Lucas children, a few nondependent legitimate and even illegitimate children would also benefit was not sufficient to invalidate the statute.

It seems unlikely that the *Lucas* statute involves purposeful discrimination.[133] Looking at all the situations in which Congress allocated benefits, it appears that Congress simply failed to anticipate this situation. Normally, the Court should not correct an inadvertent omission via equal protection; rather, correction should be left to the legislative process.[134] When the group prejudiced by the omission is as politically powerless as illegitimates, however, judicial employment of equal protection seems appropriate. Thus, although it is a close case, the proposed test would probably require rejection of the *Lucas* result.[135]

A serious deficiency in the Court's development of this area of the law has been its willingness to treat parents of illegitimate children with the same solicitude as illegitimate children themselves.[136] To be sure,

132. *Id.* at 497-99. After *Trimble v. Gordon* the provision possibly could include all children. However, since that case involved a situation in which paternity had been adjudicated prior to the father's death, it is possible that some illegitimate children are still ineligible to inherit from their fathers. *See* 430 U.S. at 773 n.15.

133. Of course, if the discrimination were purposeful, it would be clear that the Lucas children were denied equal protection. There can be no serious question of paternity. Indeed, when a man lives with a woman for eighteen years, during which time she has two children, his paternity seems substantially more certain than the typical situation in which a woman charges a man with fathering her child, the man denies it, and a judge or jury finds it more likely than not that the man was the father.

134. *See* text accompanying notes 266-70 *infra*.

135. If, contrary to the above supposition, Congress intentionally discriminated against illegitimates such as the Lucas children, there would be even less justification for the decision. By rejecting *Lucas*, the proposed analysis necessarily approves of the result, if not all the reasoning, in Jimenez v. Weinberger, 417 U.S. 628 (1974), which invalidated discrimination even more invidious than that involved in *Lucas*.

136. *But cf.* Gomez v. Perez, 409 U.S. 535 (1973) (Texas law placing duty on natural father to

parents of illegitimates may share their offspring's unpopularity with the legislature. Unlike their offspring, however, they are responsible for their status, rendering this special solicitude inappropriate. Yet in *Glona v. American Guarantee & Liability Insurance Co.*,[137] a companion case to *Levy v. Louisiana*,[138] the Court invalidated a Louisiana law that granted a wrongful death remedy to the mother of a legitimate child killed by a tortfeasor but denied such a remedy to the mother of an illegitimate child. The Court concluded that denying wrongful death benefits to mothers of illegitimate children would not deter women from having such children because "[i]t would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death."[139] The Court's reasoning is not persuasive in that effective deterrence is hardly a *sine qua non* of permissible punishment.[140] Further, the apparent purpose of the Louisiana statute was not deterrence but denial of rewards in the form of compensation to those whose irresponsible conduct created the child. While Louisiana's judgment on this matter may be criticized, the equal protection clause should not preclude the state from making it.[141]

Similarly, in *New Jersey Welfare Rights Organization v. Cahill*,[142] the Court invalidated a New Jersey statute that provided for assistance to families of working poor, defined as man and wife and at least one minor child who was either the natural child of both, the natural child of one and adopted by the other, or a child adopted by both. The Court concluded that illegitimate children were in fact treated less favorably than legitimate children under the statute. To be sure, unlike the situation in *Glona*, illegitimate children were effectively treated less favorably than legitimate children. This discrimination, however,

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support his legitimate children but not his illegitimate children held to violate equal protection clause). *See* text accompanying notes 118-20 *supra*.

137. 391 U.S. 73 (1968).

138. 391 U.S. 68 (1968), *discussed in* text accompanying notes 115-17 *supra*.

139. 391 U.S. at 75.

140. For example, the Constitution condones the jailing of chronic alcoholics for public drunkenness even though we know it will not deter them. Powell v. Texas, 392 U.S. 514 (1968). Indeed, we allow the execution of some murderers even though we are uncertain of its deterrent value. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Symposium, *Statistical Evidence on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 164 (1975).

141. This is not to suggest that the government has unlimited power to treat illegitimate parents in any manner it desires. Due process applies to everyone. Consequently, a state cannot take a bastard from his parent without a due process hearing. Stanley v. Illinois, 405 U.S. 645 (1972). There is a real difference, however, between taking a child without a hearing (which cannot be done to anyone) and denying compensation for the death of a child (which could be done to everybody if the legislature so chose).

142. 411 U.S. 619 (1973).

seems incidental to the permissible purpose of aiding family units.[143] Two adults living together, married or unmarried, cannot qualify because they are not a family unit. Indeed, unlike *Glona*, allowing unmarried adults with children to be eligible for funding may well encourage the production of illegitimate children. Furthermore, in most cases, two adults living together with their illegitimate child can marry and become eligible for family aid. To the extent that it can be argued that illegitimates tend to live with one parent, it must be noted that this statute also denies aid to legitimate children living with one parent. The Court's faulty reasoning in *Cahill* is directly attributable to its failure to carefully and precisely analyze the nature of the statute that it was evaluating.

The final case in this section is *Fiallo v. Bell*,[144] in which the Court upheld a federal immigration statute that gives special preference to legitimate parents and legitimate minor children of American citizens, and a like preference to mothers of illegitimate minor American children and children of illegitimate American mothers, but denying such a preference to the father of an illegitimate child or the child of an illegitimate father. Emphasizing the unusual deference due a congressional judgment in regard to immigration, the Court sustained the statute.

The principal concern here is with the citizen who is denied the opportunity to have his alien father or child immigrate. In this regard, there are four potential equal protection claims: (1) illegitimate fathers are treated less favorably than legitimate fathers; (2) illegitimate fathers are treated less favorably than illegitimate mothers; (3) illegitimate children of fathers are treated less favorably than legitimate children of fathers; and (4) illegitimate children of fathers are treated less favorably than illegitimate children of mothers. In regard to all of these classifications, the potential for fraud in the father-illegitimate child relationship is greater than in the favored relationship. Unlike inheritance or support cases in which paternal acknowledgment would rarely be given falsely, one would expect fraudulent claims of paternity in immigration cases where connivance is not uncommon.[145] Moreover, since conception usually occurs in a foreign country, the opportunity for fraud is enhanced. This potential for fraud seems to be sufficient evidence of a nondiscriminatory purpose to justify the Court's decision

143. *See* text accompanying notes 11-17 *supra*.

144. 430 U.S. 787 (1977).

145. *See, e.g.*, Lutwak v. United States, 344 U.S. 604 (1953).

to uphold the statute.[146]

Overall, the Court's results in cases involving illegitimacy based discrimination are less satisfactory than those involving gender based discrimination. The proposed test would sharpen the issues in this area and tend to reduce the opportunity for the type of simplistic analysis employed in *Gomez* and *Cahill*. This is not to suggest that each person applying the proposed test would necessarily reach the same result. For example, had the Court applied the proposed test in *Mathews v. Lucas*, it might have reached the same result rather than that suggested here. Nevertheless, in this area, a test that sharpens the issues is badly needed.

### ALIENAGE

In some respects, aliens are analogous to a racial minority. They are not merely underrepresented but unrepresented in the legislatures and in Congress. Unlike blacks, women and illegitimates, they still do not have the right to vote. Moreover, they have been and continue to be subject to discrimination that would not be tolerated against other groups.[147] These factors prompted the Court to conclude that "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom heightened judicial solicitude is appropriate."[148]

This conclusion, however, is hardly irrefutable. Unlike blacks or women, aliens are usually not visually distinguishable from the general population.[149] More importantly, the classification is usually obtained voluntarily and generally is not immutable.[150] Perhaps most significantly, differentiation between citizen and alien is specifically sanctioned by several sections of the Constitution.[151] Thus, although aliens have been subject to some hostile treatment as compared to citizens,

146. In addition, the distinction between legitimate and illegitimate fathers can be sustained on the suggested disposition of the *Glona* case. *See* text accompanying notes 137-41 *supra*. Favoring illegitimate mothers over fathers is further justified by the fact that the decision to enact this classification was made by a predominantly male Congress.

147. *See, e.g.*, Espinoza v. Farrah Mfg. Co., 414 U.S. 86 (1973) (holding that federal statutory prohibition against discrimination in employment, 42 U.S.C. § 2000e-2(a)(1) (1970), did not apply to discrimination against aliens).

148. Graham v. Richardson, 403 U.S. 365, 372 (1971) (citation omitted). *But see* Foley v. Connelie, 98 S. Ct. 1067 (1978).

149. Sometimes, however, discrimination against aliens is thinly disguised racial discrimination. *See, e.g.*, Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); *cf.* Yick Wo. v. Hopkins, 118 U.S. 356 (1886) (invalidating municipal ordinance on building codes that had been applied discriminatorily against Chinese laundries).

150. Of course, some aliens were brought to this country involuntarily as babies. Also, some aliens are ineligible to become citizens.

151. *See* Sugarman v. Dougall, 413 U.S. 634, 651-52 (1973) (Rehnquist, J., dissenting).

not all of this hostility can be deemed unjustifiable. It is somewhat surprising, therefore, that the Court, which has yet to hold gender or illegitimacy to be a suspect classification, has accorded that status to alienage.

In fact, alienage is a hybrid in terms of suspicion. Depending principally on which governmental body is enacting what type of law, alienage may be an entirely appropriate classification or merely a device by which a majority can unjustifiably suppress an unrepresented minority. Generally, the Court's decisions have recognized this dual aspect of alienage and have evaluated the competing interests with unusual care.

Congress, of course, is principally charged with establishing rules and conditions under which aliens may enter the country, and one would expect the Court to exhibit substantial deference to that judgment. This is precisely what the Court did in *Mathews v. Diaz*[152] when it unanimously sustained a congressional statute limiting the federal medical insurance program to aliens who had been admitted for permanent residence and had resided in the United States for five consecutive years. The Court concluded:

> Since it is obvious that Congress has no constitutional duty to provide *all aliens* with the welfare benefits provided to citizens, the party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others.[153]

Because those challenging the statute could not suggest a principled justification for a different line, the Court refused to substitute its judgment for that of Congress even though it was willing to assume that the congressional judgment may have been unnecessarily harsh.

The Court did not extend this deference to the Civil Service Commission in the companion case of *Hampton v. Mow Sun Wong*,[154] which invalidated a regulation excluding aliens from civil service employment. In that case, after assuming *arguendo* that Congress or the President could preclude aliens from public employment, the Court noted that the Commission was neither required nor forbidden to exclude aliens. Focusing on the function of the Civil Service Commission, which has no direct responsibility for either foreign affairs in

152. 426 U.S. 67 (1976).
153. *Id.* at 82 (emphasis added by Court).
154. 426 U.S. 88 (1976).

general or aliens in particular, the Court concluded that only one reason proffered for the discrimination was worthy of appraisal—the need for undivided loyalty in certain sensitive positions. The Commission argued that excluding aliens from all positions served the valid administrative purpose of eliminating the difficult task of ascertaining which positions should be so classified. The Court rejected this argument, holding that "[a]ny fair balancing of the public interest in avoiding the wholesale deprivation of employment opportunities caused by the Commission's indiscriminate policy, as opposed to what may be nothing more than a hypothetical justification, requires rejection of the argument of administrative convenience in this case."[155] This analysis is not far removed from the proposed test, which would conclude that the desire to avoid classifying jobs on the basis of sensitivity is not sufficient to render it probable that the discrimination against aliens engendered thereby was merely an incidental adjunct to this legitimate, nondiscriminatory purpose.[156]

In general, the states have no special power to limit aliens' rights. Indeed, federal enactments in this area may well preempt state legislation even without the aid of the equal protection clause.[157] Thus, insofar as state legislation is concerned, the Court should not sustain those statutes that appear to be principally designed to discriminate against aliens.[158]

*Graham v. Richardson*[159] involved severe state limitations on aliens' eligibility for welfare benefits. The Court, noting that these requirements were more severe than those provided by Congress, concluded that they were preempted by Congress and contravened the equal protection clause. The states argued that they had a legitimate interest in preserving scarce resources for their citizens. The Court found this argument unpersuasive because resident aliens, like citizens, contributed taxes to the state treasury.[160]

155. *Id.* at 115-16.

156. Indeed, there is good reason to believe from the history of this Civil Service classification that its principal purpose was to favor citizens over aliens. Although the district court suggested that this might be a legitimate purpose, the Commission chose not to argue it. *Id.* at 104 n.24.

157. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941). The preemption is not universal, however. *See* DeCanas v. Bica, 424 U.S. 351 (1976); text accompanying notes 165-69 *infra*.

158. Of course, if the discrimination is supported by the Constitution, *e.g.*, predicating the right to vote upon citizenship, the statute may be upheld.

159. 403 U.S. 365 (1971).

160. Indeed, Mrs. Richardson had been a taxpaying alien for 13 years, but was ineligible for benefits because of Arizona's staggering 15 year residency requirement. *Accord*, Nyquist v. Mauclet, 432 U.S. 1 (1977). *Nyquist*, which involved financial aid to college students, differed from *Graham* in that only those aliens who chose not to become naturalized citizens at the earliest

*Sugarman v. Dougall*,[161] which invalidated a New York law denying certain state government jobs to aliens, is not significantly different from *Graham*. The argument that the scarce resource of government jobs ought to be available only to citizens is substantially the same "put-the-alien-in-his-place" reasoning rejected in *Graham*. The contention that aliens would tend to leave the job sooner than citizens, thereby necessitating additional training of replacements, is not sufficiently convincing to render it probable that the explicit discrimination against aliens is merely an incidental adjunct to a legitimate nondiscriminatory purpose. As the Court noted, long-term resident aliens may be a better risk than American citizens who have only recently moved to New York.

New York's most powerful argument was the need to limit government policymaking to citizens. The difficulty with this argument is that the statute was not so directed. Indeed, as the Court noted, it applied to the " 'sanitation man, class B,' " but not "to persons holding elective and high appointive offices."[162] Justice Rehnquist, in dissent, made a fairly persuasive case for the proposition that the power to make administrative decisions of the kind made by appellee Dougall as an administrative assistant in the Staff Development Unit of the Manpower Career and Development Agency can appropriately be limited to citizens.[163] It is indeed possible that a careful judgment to exclude aliens from certain types of governmental service, perhaps even including Mr. Dougall's position, would be sustained.[164] The discrimination under such a statute might well be merely an incidental adjunct of a legitimate legislative purpose. However, no such benevolent purpose

possible moment were ineligible to compete for financial aid. Chief Justice Burger, and Justices Stewart, Powell, and Rehnquist, would have distinguished *Graham* and upheld the classification on the ground that any person who desired financial aid could have become eligible for it by declaring his intention to become a citizen as soon as possible. Thus, nobody in the disfavored group was powerless to remove himself from it. The Court, however, noting that "[r]esident aliens are obligated to pay their full share of the taxes that support the assistance programs," *id.* at 12, invalidated the classification. The Court reached the better result. Although lack of immutability is a factor in determining when a group is sufficiently analogous politically to a racial minority to distrust legislative action discriminating against it, that is not the only factor. Surely, a statute in a predominantly Baptist state that provided financial aid to all Baptists or those who agreed to become Baptists as soon as that church would accept them would be suspect (even absent the first amendment). Similar suspicion should be accorded a judgment of the New York legislature denying benefits to a taxpaying resident of New York on the ground that he wished to be loyal to France or Canada.

161. 413 U.S. 634 (1973).

162. *Id.* at 643 (Rehnquist, J., dissenting).

163. These decisions included "allocating funds, hiring [and] dealing with personnel." *Id.* at 662.

164. A possibility explicitly left open by the Court. *Id.* at 646-47.

could be accorded the broadside discrimination mandated by the actual New York statute.

The most difficult of the alien discrimination cases is *In re Griffiths*,[165] in which the Court invalidated a rule of the Connecticut Superior Court denying bar admission to aliens. The case is difficult because in some respects a lawyer is analogous to a government official, particularly in Connecticut, where, as the Court noted, every lawyer is a "commissioner of the Superior Court" with the power to " 'sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgement of deeds.' In the exercise of this authority, a Connecticut lawyer may command the assistance of a county sheriff or a town constable."[166]

Although the question is excruciatingly close, the proposed test would probably require that the superior court's rule be upheld. The work of an attorney is different from other occupations or even other professions. "Attorneys are the means through which the majority of the people seek redress for their grievances, enforcement and defense of their rights and compensation for their injuries and losses."[167] While these functions may not be exactly governmental, they are much closer to being so than those performed by a beautician or even a physician. Surely, Connecticut could demand that its judges be United States citizens; attorneys, though not employed by the state, also play a significant role in the judicial process.

This is not to say that the republic would crumble by permitting aliens to practice law—they have practiced in the past, in some cases undoubtedly quite well.[168] By the same token, however, some aliens would make effective United States senators and representatives if they were permitted to serve; yet, despite the inherent check of the voting populace, which would be unlikely to elect any but the most superior aliens, the Constitution explicitly forbids us to make this choice. All of

165. 413 U.S. 717 (1973).

166. *Id.* at 723 (quoting CONN. GEN. STAT. §§ 51-85, 52-90 (1975)). Mrs. Griffiths argued that since Connecticut statutes also require citizenship for other occupations, such as hairdressers and cosmeticians, *id.* at 722 n.12, the state's real purpose was to bar aliens from more than just the practice of law. Nevertheless, since the superior court's rule was separate from the other statutes, it was proper for the Court to limit its consideration to the citizen/alien classification as it related to the practice of law. In fact, the Court never decided whether its consideration should be so confined since it would have invalidated the statute either way. *Id.*

167. *In re* Griffiths, 162 Conn. 249, 262, 294 A.2d 281, 287 (1972), *rev'd*, 413 U.S. 717 (1973).

168. "Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal Courts, who were not citizens of the United States or of any State." Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1872), *quoted in In re* Griffiths, 413 U.S. at 719.

which leads to the conclusion that while Connecticut's interest in excluding aliens from the legal profession may not be compelling, it is sufficiently substantial to render it probable that the discrimination against aliens was merely an incidental adjunct to a legitimate administrative purpose.[169]

*Foley v. Connelie*,[170] which upheld a New York statute requiring its policemen to be citizens, involved a problem analytically similar to *Griffiths*. Although deciding the case contrary to *Griffiths*, the Court made no serious effort to distinguish the cases.[171] *Foley* is distinguishable in that a citizen can choose the lawyer with whom he would like contact whereas he has no choice in regard to the policeman with whom he may be confronted. While the distinction is perhaps one of degree, such distinctions are not unheard of in constitutional adjudication. In any event, the analysis under the proposed test, which rejected *Griffiths*, would for the same reasons accept *Foley*.

## RESIDENCY

Normally, statutes that discriminate on the basis of residency present no serious equal protection problem. Many governmental services such as public schools and welfare payments are intended for residents only, and denying a nonresident these services does not relegate him to an inferior status but simply requires him to obtain them from the state or locality in which he chooses to reside.[172] A different question is presented when nonresidents are treated less favorably than residents with regard to matters in which they are similarly situated. For example, a state statute that imposes a tax on a nonresident's property without imposing a similar tax on a resident's property has been held to

169. I am somewhat concerned that I, as a lawyer, may be biased in regard to the relative importance of attorneys. The fact that Mr. Justice Powell, certainly no slouch in regard to defending the integrity of the profession, *see* Bates v. State Bar of Ariz., 433 U.S. 350, 389 (1977) (Powell, J., concurring in part and dissenting in part), wrote *Griffiths* does nothing to alleviate my concern. Nevertheless, although recognizing that reasonable people can differ, the judgment expressed in text accompanying this note seems correct.

170. 98 S. Ct. 1067 (1978).

171. This point did not go unnoticed by Justice Marshall, *id.* at 1076 (dissenting opinion), or by Justice Stevens, *id.* at 1077, 1079 (dissenting opinion).

172. This does not permit a state to deny nonresidents use of those facilities necessary to effectuate constitutional rights. States are required to permit nonresidents to use their highways for interstate travel, Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); *cf.* United States v. Guest, 383 U.S. 745 (1966) (Constitution prohibits criminal conspiracies directed against right to interstate travel), and for the interchange of ideas, Marsh v. Alabama, 326 U.S. 501 (1946) (state cannot impose criminal punishment on person for distributing religious literature in a company owned town). *See also* Toomer v. Witsell, 334 U.S. 385 (1948).

violate equal protection.[173] The best justification for this result is that nonresidents, being politically impotent, are at the mercy of the legislature, which, of course, represents the residents.[174]

In recent years, however, length-of-residency requirements have been far more significant than residency requirements. The Court has found several length-of-residency requirements violative of equal protection because of their interference with the fundamental right to travel.[175] This analysis is unsatisfactory because any requirement that really does interfere with the constitutional right to travel would be unconstitutional for that reason alone, without regard to equal protection.[176]

Beyond this, if the Court were really concerned with the right to travel, it surely would have invalidated the residency requirement that it upheld in *McCarthy v. Philadelphia Civil Service Commission*.[177] Francis McCarthy, a Philadelphia fireman with sixteen years service, lived with his wife and their ten children in their Philadelphia home until several acts of gang vandalism of his home and beatings of his children caused his wife and nine of their children to move to their summer home in New Jersey. McCarthy and his oldest son continued to live in their Philadelphia home for an additional ten months until the repeated acts of vandalism forced him to sell the house and move to his mother's house in Philadelphia. For the next few months he spent two nights a week at the fire station, two to three nights at his mother's house, and the remaining time, when he had days off, with his wife and family in their New Jersey home. Although he retained substantial indicia of residence at his mother's home,[178] the Pennsylvania court

173. WHYY, Inc. v. Borough of Glassboro, 393 U.S. 117 (1968). *But cf.* Baldwin v. Fish & Game Comm'n, 98 S. Ct. 1852 (1978) (upholding favored treatment for residents in purchase of hunting licenses).

174. Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949). Although the Court has not articulated this rationale as the basis of its decisions, it has upheld similar discrimination against residents, who can complain to the legislature if they are dissatisfied, and, indeed, vote the legislators out of office. *See* Allied Stores v. Bowers, 358 U.S. 522 (1959); see especially the opinion of Mr. Justice Brennan, *id.* at 533 (concurring opinion). *Cf.* Hicklin v. Orbeck, 98 S. Ct. 2482 (1978) (invalidating Alaska statute requiring certain private employers to favor Alaska residents in regard to employment).

175. *See* notes 185-87 and accompanying text *infra*.

176. Whether length-of-residency requirements are unconstitutional for that reason is beyond the scope of this article. *Compare* Shapiro v. Thompson, 394 U.S. 618, 663-77 (1969) (Harlan, J., dissenting), *with* Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U.L. REV. 89, 116-20. *See also* Califano v. Gautier Torres, 98 S. Ct. 906 (1978) (holding that right to travel did not require that federal government provide benefits to new resident of Puerto Rico comparable to those he enjoyed as a resident of Connecticut).

177. 424 U.S. 645 (1976).

178. Appellant lived at this address on his duty days; had his own room there, paid rent in

held that the time spent with his wife and family in New Jersey rendered him a nonresident and therefore ineligible to remain a fireman.[179] It seems beyond dispute that the Philadelphia residency requirement penalized McCarthy's fundamental right to travel (not to mention his right to associate with his family) far more than any of the length-of-residency provisions invalidated by the Supreme Court in other cases.[180] Yet, the Court found the constitutionality of the residency requirement to be so clear that it did not even schedule the case for argument.

The real difference between *McCarthy* and the length-of-residency cases has nothing to do with the right to travel. Rather, it is that the former involved discrimination against nonresidents while the latter involved discrimination against newly arrived residents. Newcomers are a much more "discrete and insular" group than nonresidents in that they are first-class citizens in neither the state from which nor the state to which they have migrated. To be sure, one becomes a newcomer by choice, the status is not immutable, and as a newcomer one is not highly visible. Nevertheless, discrimination against newcomers has been fairly pervasive,[181] and some of the impetus for it, like that for discrimination against aliens, comes from the feeling that "we are better than they."[182] The political process is unavailable to correct this discrimination, since by the time an erstwhile newcomer acquires sufficient clout to influence political decisions, he is no longer a newcomer.[183] Therefore, newcomers are sufficiently analogous politically to a racial minority that a legislative or administrative decision against them should be distrusted.[184]

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kind by purchasing the household groceries and performing maintenance upkeep; was registered to vote at this address; received mail and his telephone was listed at this address; his auto was registered there as was his driver's license; he maintained his checking and savings account at a local branch; and attended church within five blocks of [this address].

McCarthy v. Philadelphia Civil Serv. Comm'n, 19 Pa. Commw. Ct. 383, 386, 339 A.2d 634, 637-38 (1975) (Crumlish, J., dissenting), *aff'd*, 424 U.S. 645 (1976).

179. McCarthy v. Philadelphia Civil Serv. Comm'n, 19 Pa. Commw. Ct. 383, 339 A.2d 634 (1975), *aff'd*, 424 U.S. 645 (1976).

180. *See* notes 185-87 and accompanying text *infra*.

181. For example, at one time or another newcomers have been subject to the following types of discrimination: "waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth." Shapiro v. Thompson, 394 U.S. 618, 638 n.21 (1969).

182. These are Professor Ely's terms. *See* text accompanying note 68 *supra*.

183. Indeed, one of the newcomers' complaints has been the denial of the franchise.

184. *Accord*, McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 VAND. L. REV. 987, 1016-23 (1975).

On the whole, the Court's results, if not its reasoning, in this area have been satisfactory. It rightly invalidated one-year residency requirements for welfare payments,[185] voting,[186] and health care.[187] In none of those cases was there sufficient evidence of a nondiscriminatory purpose to render it probable that the discrimination against newcomers was merely an incidental adjunct to a legitimate purpose. On the other hand, the Court has approved a one-year residency requirement for in-state tuition payment at a state university.[188] Although under the proposed test this question is close, the Court was again probably correct. A high percentage of out-of-state students do not in fact intend to become permanent residents, but when the prize is a substantial tuition saving, it is not difficult for such a student to cloak himself with the trappings of a domiciliary.[189] This unusual combination of circumstances is probably, though barely, sufficient evidence of a nondiscriminatory purpose to sustain a one-year length-of-residency requirement.[190]

The final case in this area is *Sosna v. Iowa*,[191] in which the Court upheld a one-year residency requirement for persons seeking a divorce from a spouse who also was not a resident of the state. Mr. and Mrs. Sosna lived together as husband and wife in New York from 1967 to 1971. At that point, they separated, and in 1972, Mrs. Sosna moved to Iowa. Three months later, she filed for divorce in an Iowa court, but because her husband was not a resident of Iowa and she had not yet lived there for a year, the Iowa court lacked statutory jurisdiction to grant the divorce.

Under *Williams v. North Carolina*,[192] the Constitution would have permitted Iowa, as the domicile of the plaintiff, to grant a divorce binding in all jurisdictions, including New York. However, as Justice Jackson's dissent in *Williams* established, not all aspects of justice or logic point to this conclusion.[193] New York, as both the domicile of the

185. Shapiro v. Thompson, 394 U.S. 618 (1969).

186. Dunn v. Blumstein, 405 U.S. 330 (1972).

187. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974).

188. Starns v. Malkerson, 401 U.S. 985 (1971).

189. For example, an aspiring domiciliary can register to vote, obtain a driver's license, and if rich enough, purchase a home. *See* Vlandis v. Kline, 412 U.S. 441, 464-65 (1973) (Rehnquist, J., dissenting).

190. But no more than that. *See* Vlandis v. Kline, 412 U.S. 441 (1973).

191. 419 U.S. 393 (1975).

192. 317 U.S. 287 (1942).

193. *Id.* at 311-24 (Jackson, J., dissenting).

defendant and the marital domicile, had a substantial interest in the status of the Sosnas' marriage. Thus, Iowa's one-year residency requirement can, and probably should, be analyzed as a laudatory effort to respect its sister states' interest in the marriages of their domiciliaries.[194] So viewed, this requirement is hardly an effort to put a newcomer in her place, but rather is an attempt to give fair treatment to nonresidents, the paradigmatic opposite of a suspect classification. Surely, Iowa could fairly conclude that its interest in a marriage in which the defendant lived in another state was not sufficient to warrant its dissolving the marriage at the behest of the plaintiff until such time as he or she lived in the state for a year.[195]

*Sosna* provides a good illustration of the utility of the proposed test. Iowa's interests may not be "compelling" in the sense that this term is sometimes used. However, objectively analyzed, the primary purpose of the statute appears to be nondiscriminatory. Since the resulting discrimination against Mrs. Sosna vis-a-vis a long-term resident of Iowa is merely an incidental adjunct to this legitimate nondiscriminatory purpose, the Court rightly upheld the statute.

## WEALTH

Cases involving discrimination on the basis of wealth can be classified as direct and indirect. Charges of indirect discrimination are based upon the law's failure to alleviate a poor person's inability to make a needed payment. Most of the cases fall into this category.

Much of the impetus for the proposition that indirect discrimination against the poor may constitute invidious discrimination is attributable to Anatole France's sardonic quip: " 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.' "[196] The difficulty with seeking

194. Furthermore, if Iowa were to conclude incorrectly that based on her short-term residency Mrs. Sosna became a domiciliary entitled to a divorce, it would be penalized in that no other state would be bound to give its decree full faith and credit. *See* Williams v. North Carolina, 325 U.S. 226 (1945).

195. This purpose is underscored by the provision of the statute that eliminates the length-of-residency requirement when the defendant is also a resident of Iowa. In that situation there is no sister state or nonresident to protect with the requirement; hence, the requirement is removed. Indeed, in the case at bar, Mrs. Sosna was not even deprived of her right to obtain a divorce. She could, and in fact did, obtain a divorce in New York, thereby satisfying her needs, New York's interest, and Mr. Sosna's right to procedural fairness.

196. J. COURNOS, A MODERN PLUTARCH 27 (1928), *quoted in* Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring).

too much mileage from this *bon mot* is that it is almost impossible to limit in a principled way, for unless the state is forbidden to charge for its services, it necessarily will indirectly favor the rich. Indeed, the Constitution does not forbid punishing one for sleeping under bridges, begging in the street, and stealing bread.[197]

The first and prototypal case of indirect discrimination against the poor in the criminal context was *Griffin v. Illinois*,[198] in which the Court invalidated on equal protection grounds[199] a requirement that all persons, including indigents, purchase a transcript as a condition of most appeals.[200] The heart of the opinion was the seductively attractive but deceptively simple observation: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[201] The deceptive simplicity lies in the fact that, platitudes to the contrary, money can make a difference in so many ways that the kind of trial a man gets really does depend on the amount of money he has.[202] The Court recognized this in *Ross v. Moffitt*,[203] when it held:

> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.[204]

Once it is recognized that basic fairness rather than basic equality is the aim of the *Griffin* line of cases, due process seems more appropriate than equal protection as a mode of analysis. Due process grounds were certainly available in *Griffin*, and under the Court's usual standard for ascertaining the components of due process, the right to appeal

197. On the other hand, a poor person may not be likely to receive a substantial prison term for a first offense that she commits in the presence of those who kidnapped her, as did Patricia Hearst. There is a good chance that absent her wealth and notoriety, the mitigating circumstances of her case would have prompted a significantly less severe sentence. See Blake, *Justice: Is It Partial to the Wealthy?*, L.A. Times, June 2, 1977, at —, col. —.

198. 351 U.S. 12 (1956).

199. The Court employed both due process and equal protection terminology, but its rationale was almost exclusively equal protection.

200. Free transcripts were available to indigents in capital cases and cases involving constitutional questions. 351 U.S. at 14-15.

201. *Id.* at 19.

202. *E.g.*, a rich person can hire unlimited investigators. Of course, money isn't always helpful. *See* note 197 *supra*.

203. 417 U.S. 600 (1974).

204. *Id.* at 616.

should have been included.[205] Thus far, however, the Court has steadfastly refused to do so.[206]

Even if equal protection were an appropriate basis for invalidating criminal procedures that indirectly discriminate against the poor, it is most assuredly inappropriate when noncriminal statutes effectuate such discrimination.[207] If the rule were otherwise, a welfare recipient could argue that any program that did not provide a benefit that a wealthy person could obtain was unconstitutional. For example, in *Maher v. Roe*,[208] plaintiff contended that Connecticut's decision to limit state medicaid payments to medically necessary abortions denied equal protection to an indigent desiring an elective abortion. The Court emphatically rejected this argument, observing that

> [i]n a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.[209]

To be sure, the right to an abortion is constitutionally protected, however dubious the decision declaring it so may have been.[210] The right to travel, however, is also constitutionally protected,[211] yet no one would seriously contend that a poor person is denied equal protection by a welfare department's decision not to finance a vacation.

Plaintiff's claim in *San Antonio Independent School District v.*

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205. Although the right to appeal a conviction for a serious offense has not always been recognized, it is recognized today by all states of the Union. Such recognition is not surprising in view of its importance. Prejudicial errors are frequently discovered on appeal. Thus, the appellate process, like the presumption of innocence and the requirement of proof of guilt beyond a reasonable doubt, stands as a bulwark against the ultimate horror of the criminal law, conviction of an innocent man. To allow this bulwark against an unjust conviction to be removed would certainly seem to be "a denial of fundamental fairness shocking to the universal sense of justice," Betts v. Brady, 316 U.S. 455 (1942), and therefore violative of due process.

206. *See, e.g.*, Estelle v. Dorrough, 420 U.S. 534 (1975). Nevertheless, due process would seem to require access to all procedural safeguards provided by the state as part of its guilt-determining process, whether or not the Constitution mandates them for all defendants. For example, when *Griffin* was decided, the right to a jury trial was not applicable to the states. Maxwell v. Dow, 176 U.S. 581 (1900), *overruled 12 years after Griffin by* Duncan v. Louisiana, 391 U.S. 145 (1968). Yet, if a state were to provide for jury trial as a means of determining guilt or innocence, but deny such a right to those unable to pay for it, a person denied the right to a jury trial would be denied due process. This would seem to follow a fortiori from Boddie v. Connecticut, 401 U.S. 371 (1971), which held that due process was denied by a rule conditioning access to a *civil* court for the purpose of obtaining a divorce on the payment of a fee. *But cf.* United States v. Kras, 409 U.S. 434 (1973) (bankruptcy fee provisions do not constitute denial of equal protection).

207. Arguably a criminal proceeding is sui generis because it is initiated by the state.

208. 432 U.S. 464 (1977).

209. *Id.* at 471.

210. Roe v. Wade, 410 U.S. 113 (1973). *See* Loewy, *supra* note 4; Ely, *supra* note 3.

211. *E.g.*, United States v. Guest, 383 U.S. 745 (1966).

*Rodriguez*,[212] in which the Court upheld local financing of public education, was not significantly stronger. The claim that people living in poor districts are treated less favorably than those living in wealthier districts is saying little more than that the rich can buy more than the poor. This analysis is equally applicable to the claim that those who live in richer districts can get a better education for their children while paying taxes at a lower rate. This is analogous to the obvious fact that a millionaire can buy a Cadillac for a smaller percentage of his wealth than most of the rest of us would spend on a Volkswagen. Furthermore, the class indirectly discriminated against is not even made up of poor individuals, but rather individuals living in a community with relatively little taxable wealth who may or may not be relatively poor themselves.[213] Thus, the Court correctly concluded that

> [t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[214]

Direct discrimination on the basis of wealth is a different matter. Mr. Justice Harlan, a staunch opponent of equal protection analysis in cases involving indirect discrimination against the poor, said: "The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' *as such* in the formulation and application of their laws."[215] Some years earlier, Justice Jackson, with characteristic clarity and elegance, opined: " 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color."[216]

In many ways the poor are analogous politically to a racial minor-

212. 411 U.S. 1 (1973).

213. *See* Note, *A Statistical Analysis of the School Finance Decision: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1328-29 (1972).

214. 411 U.S. at 28.

215. Douglas v. California, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting).

216. Edwards v. California, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring). These observations are somewhat overstated since in many cases indigence is a source of rights—the rich do not get free transcripts, welfare checks, or free abortions even when medically necessary. But because the obvious purpose of statutes providing these benefits is to ensure access to minimal standards, it is certainly not invidious to limit the benefits to those who otherwise would not have access to them.

ity: they have suffered a long history of discrimination, dating back at least to the Articles of Confederation, which denied paupers the privileges and immunities granted other citizens;[217] the Supreme Court itself once characterized the poor as a "moral pestilence";[218] and, even today, much effort is expended on keeping the poor in their place, that is, somebody else's neighborhood.[219] Although the poor are not highly visible in the sense that blacks and women are (except perhaps for the very poor) and their status is not immutable (although many who were born and raised in abject poverty are less certain of their power over change than was Horatio Alger), the analogy to a racial minority is sufficiently close to require objective evidence of a nondiscriminatory purpose sufficient to justify any law that directly discriminates against them.[220]

Perhaps the clearest illustration of unjustifiable discrimination against indigents is *Edwards v. California*,[221] in which the Court invalidated a California statute punishing any person who brought a nonresident indigent into the state. The purpose of the statute was obvious, and, as the Court noted, "the indigent non-residents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy."[222] Although the Court employed other grounds to invalidate the provision,[223] it seems clear that the statute also violated equal protection.

More recently, California's efforts to discriminate against the poor

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217. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state . . . .

Articles of Confederation, art. 4.

218. Mayor of New York v. Miln, 36 U.S. (11 Peters) 102, 142 (1837).

219. *See, e.g.*, James v. Valtierra, 402 U.S. 137 (1971), *discussed in* text accompanying notes 224-30 *infra*; *cf.* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding zoning ordinance restricting number of unrelated persons permitted to live in one house), *discussed in* text accompanying notes 11-17 *supra*. *See also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

220. *See generally* M. HARRINGTON, THE OTHER AMERICA 14-17 (1969).

221. 314 U.S. 160 (1941).

222. *Id.* at 174.

223. The Court relied on the commerce clause, *id.* at 177, the concurring opinions on privilege and immunities, *id.* at 181 (Douglas, J., concurring), 186 (Jackson, J., concurring).

have become more sophisticated and more successful. Specifically, in *James v. Valtierra*[224] the Court upheld a California constitutional provision prohibiting the construction of low income housing until a majority of the voters of the community had approved the project in a referendum, thereby rendering it possible for a community desirous of minimizing its number of poor citizens to do so by substantially reducing their housing opportunities.

Of course, the poor have no right as such to multi-family housing developments. A community may, if it wishes, zone itself for exclusively single family housing notwithstanding the resulting diminution of the number of poor and/or blacks who will be able to live there.[225] *James* was different, however, in that only housing for the poor was subject to a mandatory referendum. As Mr. Justice Marshall put it in dissent: "Publicly assisted housing developments designed to accommodate the aged, veterans, state employees, persons of moderate income, or any class of citizens other than the poor, need not be approved by prior referenda."[226] Thus, the mandatory referendum provision does directly discriminate against the poor.

Such discrimination should be unconstitutional unless there is objective evidence of a legitimate nondiscriminatory purpose sufficient to render it probable that the discrimination was merely an incidental adjunct of the legitimate, nondiscriminatory purpose. The only plausible nondiscriminatory justification for this provision is that the communities involved must waive taxes and provide services to low income housing.[227] On balance, this does not seem sufficient to justify the discrimination. Low income housing is hardly unique in receiving services without paying taxes,[228] and even if it could be considered sui generis because of its size, number of locations, or other attributes, it would be difficult to conclude that the discrimination engendered thereby is merely an incidental adjunct to a legitimate nondiscriminatory purpose. Given the history of discrimination against the poor in

224. 402 U.S. 137 (1971).

225. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); *cf.* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (validating zoning ordinance restricting number of unrelated persons permitted to live in one house), *discussed in* text accompanying notes 11-17 *supra*.

226. 402 U.S. at 144.

227. *Id.* at 143 n.4.

228. *See, e.g.*, CAL. MIL. & VET. CODE §§ 1120-1121 (1954).

the nation in general and in California in particular,[229] more justification should be forthcoming.[230]

The final case for consideration in this section is *Harper v. Virginia State Board of Elections*,[231] which invalidated payment of a poll tax as a condition of voting.[232] Payment of a poll tax as a condition of voting can be analyzed as a hybrid between direct and indirect discrimination against the poor. Inasmuch as the poor are not denied the vote per se, but merely denied it if they cannot or do not pay the tax, the discrimination appears to be indirect. Unlike the cost of a transcript, however, which is used to pay for the actual printing, the poll tax is not used to finance the election—rather, like other taxes, it is used to finance state services.[233] Thus, an indigent is not denied the right to vote simply because of his inability to pay the cost of that service, but because of his inability to pay one of the most regressive taxes ever devised.[234]

Conceivably, it would be permissible to condition some privileges, such as the issuance of a driver's license, upon the payment of a poll tax, inasmuch as the poor would at least have the opportunity to exert their influence on the legislature in an effort to change the law.[235] When, however, the very right to influence the legislature is conditioned on ability to pay the tax, the discrimination is especially invidious. The state's principal justification for the law, other than a desire to disenfranchise the poor,[236] was to facilitate collection of the poll tax.

229. *See, e.g.*, Edwards v. California, 314 U.S. 160 (1941), *discussed in* text accompanying notes 221-23 *supra*.

230. To be sure, unless the referendum procedure is applied to all legislation, some groups will be treated less favorably than others. This inequality of treatment only becomes suspicious, however, when the group treated less favorably is so "discrete and insular" that it was once a crime to bring one of its members into the state.

231. 383 U.S. 663 (1966).

232. Despite its name, the poll tax is merely a head tax, and not a tax on voting. Conditioning the vote on its payment is merely a means of enforcement. Each person must pay the tax whether he votes or not.

233. In Virginia, public schools received one dollar of the tax and the other fifty cents was for general expenditures. 383 U.S. at 664 n.1.

234. It is doubtful that any responsible political theorist supports the poll or head tax as a fair means of allocating the cost of government. Even Senator Goldwater, one of the staunchest opponents of progressive taxation, contends that taxation in proportion to wealth is the only fair method of allocating the tax burden. B. GOLDWATER, CONSCIENCE OF A CONSERVATIVE 61 (1960). While this does not suggest that the poll tax is unconstitutional, it does cause one to look askance at a law that denies privileges to those who cannot pay.

235. *See, e.g.*, Law of Aug. 28, 1957, ch.121, § 2, 1957 Maine Laws 78 (formerly codified at ME. REV. STAT. tit. 29, § 584 (1964)) (repealed 1973), *cited in* 383 U.S. at 668 n.5.

236. It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means,

In view of the history of the poll tax as a device to disenfranchise the poor,[237] coupled with the insignificance of the revenue collected from it relative to other taxes,[238] this justification does not seem sufficient to render it probable that the discrimination against the indigent occasioned thereby was merely an incidental adjunct to a legitimate nondiscriminatory purpose.

### VOTING AND REPRESENTATION

Some laws that deny the right to vote can be invalidated on the ground that they discriminate against groups that are sufficiently analogous to racial minorities to distrust legislative judgments against them. Thus, the poor in *Harper* and the newcomers in *Dunn v. Blumstein*[239] were properly accorded the right to vote under the equal protection clause. Other limitations on the franchise such as age, citizenship and residency are clearly permissible. Still others do not discriminate against groups similar to racial minorities, but are arguably unjustifiable; such limitations should be analyzed under some clause other than equal protection.

For example, in *Harper*, the Supreme Court invalidated payment of the poll tax as a condition of voting for all citizens, not merely for those too poor to pay the tax. There would seem to be no equal protection reason to invalidate a classification discriminating between those who pay their taxes and those who wilfully fail to do so. The latter group may be unpopular (as indeed tax delinquents and criminals should be), but they are hardly analogous to a racial minority. The fact that equal protection does not require equality between taxpayer and wilful tax delinquent does not necessarily mean, however, that the latter can be denied the right to vote, for it is possible to conclude as the Court did in *Harper* that "the right to vote is too precious, too fundamental to be so burdened or conditioned."[240] But such a conclusion is essentially premised on due process considerations.[241]

Similarly, the Court incorrectly relied on equal protection in

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and that the community and the nation would be better managed if the franchise were restricted to such citizens.

383 U.S. at 685 (Harlan, J., dissenting).

237. *Id.* at 684-85. Perhaps the tax served also to disenfranchise blacks. United States v. Texas, 252 F. Supp. 234, 245 (W.D. Tex. 1966).

238. United States v. Texas, 252 F. Supp. 234, 253 (W.D. Tex. 1966).

239. 405 U.S. 330 (1972). *See* note 186 and accompanying text *supra*.

240. 383 U.S. at 670.

241. One can argue with some persuasiveness that the right to vote is protected by due process. One can also argue that it is protected by the privileges and immunities clause, the ninth

*Kramer v. Union Free School District*,[242] in which it invalidated a New York statute providing that the school board in certain districts was to be elected by qualified voters who either owned or leased taxable real property in the district, were married to one who owned or leased such property, or had a child enrolled in one of the schools. Kramer, a bachelor stockbroker who lived in his parents' home and therefore failed to meet any of the school board voting requirements, represented a class that clearly was not analogous to a racial minority. Indeed, unlike the situation in *Harper* in which those barred from voting also lost their influence with the legislative body that barred them, Kramer and those similarly situated were able to vote in elections for the state legislature and thereby influence legislators to change the school board voting requirement.[243] Hence, there is no basis for Kramer's claim that he was denied equal protection. This is not to say that *Kramer* was wrongly decided. In view of the fundamental nature of the franchise, one might well contend that New York's interest was not sufficient to deprive Kramer of it. Once again, however, equal protection should have nothing to do with the resolution of the question.[244]

Legislative apportionment is another matter. Here, the underrepresented citizens are claiming that they are treated less favorably

amendment, or the republican form of government clause. The conclusion in Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875), that it is not so protected is certainly subject to reevaluation in light of modern insights. The right is certainly fundamental in the literal sense of being preservative of all other rights. Indeed, it is doubtful that any other right not explicitly guaranteed by the Constitution is as universally regarded as fundamental to a free society as the right to vote. One would certainly be hard-pressed to explain why the right to an abortion is implicit in the concept of ordered liberty, but the right to vote is not. *See* Roe v. Wade 410 U.S. 113 (1973) (holding the right to an abortion to be protected by the due process clause). To be sure, the right to vote can be conditioned on age, citizenship and residency, whereas the right to an abortion cannot. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976). These and perhaps other qualifications, however, are necessary to protect the state's compelling interest in assuring requisite voter maturity, loyalty, and interest. In this regard, they serve the same function as trimesters serve in determining when the right to abortion can be limited. Whether the Court rightly concluded that wilful nonpayment of a poll tax cannot disqualify a voter is debatable. By wilfully refusing to pay a tax he can afford, a citizen shows sufficient contempt for his government that he can be said to have opted for second-class citizenship. Indeed, he may well have subjected himself to a criminal conviction that could possibly result in his permanent disenfranchisement. *Cf.* Richardson v. Ramirez, 418 U.S. 24 (1974) (state law disenfranchising convicted felons does not violate the equal protection clause). However that question may be resolved, it has nothing to do with equal protection.

242. 395 U.S. 621 (1969).

243. *See id.* at 639 (Stewart, J., dissenting); Lee, *Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer v. Union Free School District No. 15*, 15 ARIZ. L. REV. 458, 463-64 (1973).

244. The same is true in regard to the right to place a candidate's name on the ballot. The Court held in Williams v. Rhodes, 393 U.S. 23 (1968), that this is a form of political association protected by the first amendment. As Mr. Justice Harlan's concurring opinion noted, it is therefore "unnecessary to draw upon the Equal Protection Clause." *Id.* at 42.

than their counterparts who enjoy greater representation. At first glance, an underrepresented citizen does not appear to be analogous to a member of a racial minority because he is not visually identifiable, subject to pervasive discrimination, or, contrary to Chief Justice Warren's analysis, "that much less a citizen."[245] In one crucial respect, however, he is politically analogous to a member of a racial minority—he has a disproportionately small voice in the legislature. The problem, of course, does not always lend itself to a legislative solution. If, for example, twenty percent of the population controls fifty-five percent of the state senate, it is entirely conceivable that in every session a reapportionment bill would pass the house and be defeated 55-45 in the senate. Consequently, *Baker v. Carr*[246] was clearly correct in holding that a claim of malapportionment is cognizable under the equal protection clause. In addition, there is an exceptionally strong policy reason for requiring the legislature to be substantially representative, since "[t]he presumption of constitutionality . . . [is] based on an assumption that the institutions of state government are structured so as to represent fairly all the people."[247] Thus, a little judicial activism in preventing unfair representation justifies substantial judicial deference to the legislatures in most other cases.[248]

The next question concerns the constitutional standard an apportionment scheme should be required to meet. The 1964 reapportionment cases held "that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[249] Mr. Justice Stewart suggested that "the plan must be a rational one . . . [and] must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State."[250]

245. Reynolds v. Sims, 377 U.S. 533, 567 (1964). "I find it impossible to understand how or why a voter in California, for instance, either feels or is less a citizen than a voter in Nevada, simply because, despite their population disparities, each of those States is represented by two United States Senators." Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 746 (1964) (Stewart, J., dissenting).

246. 369 U.S. 186 (1962).

247. Kramer v. Union Free School Dist., 395 U.S. 621 (1969), *discussed in* text accompanying note 242 *supra*. The statement was less appropriate in *Kramer* than it is in explaining the reapportionment decisions. *See* Lee, *supra* note 243, at 463.

248. Of course, this deference does not apply when the Constitution has determined that a temporary majority should not rule, *e.g.*, when freedom of speech is abridged. Neither should it apply to those laws that treat racial minorities, or groups politically analogous to them, less favorably than the remainder of the population.

249. Reynolds v. Sims, 377 U.S. 533, 577 (1964).

250. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 753-54 (1964) (Stewart, J., dissenting).

Justice Stewart's approach is better than that taken by the Court, for if a minority cannot systematically frustrate the majority, the rationale for treating the underrepresented majority as a "discrete and insular" group vanishes. The proposed test would modify Justice Stewart's test by also invalidating those apportionment schemes that substantially disadvantage minorities—for example, a scheme in which sixty percent of the population controlled ninety percent of the legislature. When a legislative apportionment scheme does not significantly diminish the voting power of a definable group in the legislature, however, the scheme should be upheld. In *Mahan v. Howell*,[251] the Court, while purporting to adhere to the 1964 cases, permitted a sixteen percent deviation between the most over- and underrepresented districts in order to maintain a certain degree of integrity in Virginia's political subdivisions. By allowing this degree of flexibility, but not allowing the kind of apportionment whereby discernible groups or areas are seriously underrepresented, the Court appears to be adopting a basically sound approach.

## RATIONALITY

A recent *Yale Law Journal* Note contended that the concept of rationality in regard to equal protection is illusory.[252] The author correctly concluded that all classifications are rationally related to some purpose, and the only question is whether the purpose is permissible. For example, every statute that would have been found violative of equal protection under the proposed test was rationally (indeed ideally) related to discriminating against a group that is sufficiently analogous politically to a racial minority to distrust legislation discriminating against it. Those statutes were unconstitutional because that purpose is not permissible. It is the thesis of this article, however, that a discriminatory purpose is the *only* purpose that is impermissible insofar as equal protection is concerned.[253]

To illustrate, consider the following situation: For years, women had sold flowers on the sidewalk of Franklin Street (the main street in town) in Chapel Hill, North Carolina. These "flower ladies" were tolerated, indeed appreciated, by the local citizenry. About five years ago, a substantial number of vendors of leather goods began selling

251. 410 U.S. 315 (1973).

252. Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

253. Of course, other purposes may be impermissible for other reasons, such as first amendment and due process considerations.

their wares on the Franklin Street sidewalk. Because they added congestion without adding cheerfulness and color for the pedestrians on the sidewalk, and thus never achieved the flower ladies' popularity, the Board of Aldermen enacted the following ordinance:

> Whereas traffic congestion caused by sidewalk vendors has made the Franklin Street sidewalk a less pleasant place on which to walk, sidewalk vending on Franklin Street is hereby declared to be a misdemeanor punishable by not more than a one hundred dollar fine, thirty days in jail, or both. This ordinance shall not apply to those vendors whose only wares are flowers.[254]

The Supreme Court has taken several different approaches to the type of equal protection challenge that a frustrated vendor of leather goods might make against the ordinance. In the 1930's, the Court would have invalidated the ordinance because there was no evidence that flower vendors created less traffic congestion than other vendors.[255] During the next three decades, the Court would have sustained the ordinance on the ground that, for all the record showed, the aldermen may have believed that flower vendors, in view of the nature or extent of their activities, caused less traffic congestion than other vendors.[256] Finally, in the 1970's, the Court would have sustained the statute on the ground that the aldermen could have concluded that flower vendors made Franklin Street a more pleasant place.[257] It is submitted that none of these approaches is either necessary or desirable to resolve the equal protection challenge.

Each approach assumes that the legislative body has done something it must justify. The Constitution, however, does not normally require legislation to be justified; rather, it provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[258] Traditionally, however, the Court has considered inequality per se enough to require some justification, however slight.[259] Under the proposed test, inequality would not trigger the need for justification unless the inequality was directed against a group that is sufficiently

254. While the above narrative is basically factual, the ordinance is not a verbatim copy of the actual ordinance. It is presented in this form to illustrate the problems with the rational basis test.

255. Smith v. Cahoon, 283 U.S. 553 (1931).

256. Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Ferguson v. Skrupa, 372 U.S. 726 (1963).

257. City of New Orleans v. Dukes, 427 U.S. 297 (1976).

258. U.S. CONST. amend. X.

259. *See, e.g.*, cases cited notes 256 & 257 *supra*.

analogous to a racial minority to distrust a legislative judgment against it.

The Chapel Hill ordinance, by favoring flower vendors, necessarily discriminated against vendors of other products. At least three possible motivations could explain the aldermen's decision to do this: (1) they concluded that the "flower ladies" did not contribute to the traffic congestion to the same extent as the other vendors; (2) they deemed the presence of the "flower ladies" to be an institution indigenous to Chapel Hill and therefore worthy of protection even though the "flower ladies" contributed to the congestion as much as any other vendors; or (3) the "flower ladies" and their friends could exert enough influence in the next election to make things uncomfortable for the aldermen who did not vote to exempt them from the ordinance.

If the aldermen acted from either of the first two motives, the Court and most commentators would sustain the ordinance.[260] If the aldermen acted from the third motive, however, some of the most respected professorial and judicial thought would require invalidation of the ordinance. Professors Tussman and ten Broek in their seminal article contended "that legislative submission to political pressure does not constitute a fair reason for failure to extend the operation of a law to those similarly situated whom it leaves untouched."[261] Mr. Justice Jackson was even more emphatic in his concurring opinion in *Railway Express Agency, Inc. v. New York*, in which, with his usual facility of expression, he opined:

> I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and

260. For a case that the Court viewed as involving a motive like the first one, see Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949). For a case involving a motive like the second one, see City of New Orleans v. Dukes, 427 U.S. 297 (1976). Professor Gunther would sustain the legislation on the basis of the first motive only if there was evidence that "flower ladies" did not contribute to traffic congestion to the same extent as other vendors. He would sustain the legislation on the basis of the second motive only upon proof that it really was one of the legislature's motives. Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court*, 86 HARV. L. REV. 1 (1972).

261. Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

> choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[262]

Despite the force of these arguments, they should not be accepted. Although the words "equal protection" are definitionally capable of precluding all special interest or pressure group legislation, there is nothing in the history of the amendment to support such a radical altering of the traditional function of a legislature.[263] Pragmatically there is more to be said against than for such an interpretation, since our system of government is based on a legislature responsive to an electorate capable of "firing" those legislators who do not satisfy it. For this reason legislatures, unlike administrative bodies and courts, normally do not have to justify their actions.[264]

In regard to the street vending ordinance, the remedy of the leather goods vendors is to attempt to pressure the aldermen as the "flower ladies" had done. If they can neither promote enough support among the citizenry to effectively pressure the aldermen nor convince the aldermen that justice requires repeal of the ordinance, the meaning of democracy is that the ordinance remains. It would be different if leather goods vendors were analogous politically to a racial minority; then they could contend that the political process could not work for their group and therefore the equal protection clause should be employed to invalidate the discrimination. So long as the group is not analogous to a racial minority, however, it should not be able to use equal protection when persuasion and pressure have either been tried and failed or not been tried at all.[265]

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262. 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

263. For a view of the traditional functions of a legislature see Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810 (1974). *See also* Posner, *supra* note 36.

264. On this point there is disagreement with Professors Gunther, note 260 *supra*, and Christie, *A Model of Judicial Review of Legislation*, 48 S. CAL. L. REV. 1306 (1948), who contend that the legislatures should be required to justify their actions.

265. One could argue that in fact the leather goods vendors were analogous politically to a racial minority inasmuch as they tended to be "hippies," whereas the "flower ladies" were fine old southern ladies. The resolution of this question depends in part on whether a seemingly neutral statute could be unconstitutional because of a discriminatory effect. *Cf.* Washington v. Davis, 426 U.S. 229 (1976) (validating police qualifying exams that had racially disproportionate impact). That question is beyond the scope of this article, *see* note 2 *supra*. Consequently, throughout the discussion of the ordinance, it is assumed *arguendo* that vendors of leather goods differ from vendors of flowers only in the wares that they sell.

Occasionally, a classification may be adopted because of inadvertence. For example, assume that one of the "flower ladies" sold a potted flowerless plant on Franklin Street, and since she could not say that her only wares were flowers, assume that the highest North Carolina court that would hear the case upheld her conviction for violating the ordinance.[266] Should the Supreme Court reverse her conviction on the ground that excluding plant vendors from the flower proviso was inadvertent and irrational? The proposed test would uphold the conviction. It is not the function of the Court, acting pursuant to the equal protection clause, to redraft the ordinance in accordance with what it thinks the aldermen wanted to say. The aldermen can remedy the situation by amending the ordinance to exempt plant vendors, retroactively if desired,[267] and if the aldermen do not so act, the "plant lady" has the same remedy as any other citizen—political retribution to the extent she can muster it.

The deficiencies of the rational basis test are apparent from this analysis of a semi-fictionalized Chapel Hill ordinance.[268] As a practical matter, rational basis is virtually a toothless standard in the area of economic regulations anyway.[269] It is time to formally abandon it.[270]

## CONCLUSION

Unlike recent suggestions of multi-tiered equal protection,[271] the

266. This of course fixes the meaning of the statute. *See, e.g.*, Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

267. *Cf.* Hamm v. City of Rock Hill, 379 U.S. 306 (1964) (overturning convictions of blacks for participating in lunch counter sit-ins based on Civil Rights Act of 1964 passed after the convictions).

268. The real statute was invalidated by the trial judge, whereupon the aldermen enacted an ordinance proscribing all vending on Franklin Street. The "flower ladies" then moved into a privately owned alley adjacent to the street. Subsequently, a local bank built an indoor corridor in the area, into which the "flower ladies" moved, and where they have been happily selling flowers ever since.

269. In some cases in recent years, the Court has appeared to employ a more potent rational basis test. See Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L. REV. 1071 (1974); Gunther, *supra* note 260. These cases have not involved purely economic regulations, however.

270. It is arguable that when a provision is demonstrably arbitrary, even in an economic setting, the statute should be held violative of due process. *See, e.g.*, McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. That question is beyond the scope of this article. In some of the cases employing a more potent rational basis test, the group discriminated against was politically analogous to a racial minority, *e.g.*, illegitimates, *see* text accompanying notes 110-47 *supra*. Other cases could be decided better on other grounds. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972), *discussed in* text accompanying notes 18-23 *supra*.

271. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting); Nowak, *supra* note 269.

proposed test creates a one-tiered framework. In every equal protection case, the Court would ask a maximum of three questions: (1) Is the group discriminated against sufficiently analogous politically to a racial minority to distrust a legislative or administrative decision discriminating against it? (2) If so, is there objective evidence of a legitimate nondiscriminatory purpose? (3) If so, is that evidence sufficient to render it probable that the discriminatory effect was merely an incidental adjunct to the legitimate, nondiscriminatory purpose? If the answer to the first question is "no," there can be no denial of equal protection. If the answer to that question is "yes," the statute or regulation is presumptively unconstitutional and the second question must be considered. A "no" answer to the second question means that the presumption of unconstitutionality requires invalidation of the discriminatory enactment; a "yes" answer triggers the balancing process inherent in the third question, leaving the burden of justification on the state. The proposed test is uniform, basically straightforward, relatively objective, reasonably flexible, and, most importantly, fairly attributable to the Constitution.

A cursory analysis of *Castaneda v. Partida*,[272] in which the Court rejected the argument that a governing majority can be trusted not to discriminate against itself, might suggest an unwillingness on the part of the Court to adopt that portion of the proposed test that focuses on whether there are reasons to distrust a legislative or administrative decision to discriminate. However, *Castaneda* involved a community in which it was not clear how long the Mexican-Americans, who constituted an overwhelming majority of the citizenry, had had a governing majority, or how meaningful that majority was.[273] Because the Court seemed concerned that the newly empowered Mexican-American jury commissioners might tend to favor the generally higher class Anglos and discriminate against their more downtrodden Mexican-American brethren,[274] it specifically distinguished this case from one in which "a

272. 430 U.S. 482 (1977).

273. "Among the evidentiary deficiencies are the lack of any indication of how long the Mexican-Americans have enjoyed 'governing majority' status, the absence of information about the relative power inherent in the elective offices held by Mexican-Americans, and the uncertain relevance of the general political power to the specific issue in this case." *Id.* at 1283.

274. Mr. Justice Marshall emphasized this point. *Id.* at 1284-85 (concurring opinion). The Court recognized the possibility that "[t]he jury commissioners were from the higher socio-economic classes, and they tended to select prospective jurors from among their peers. Consequently, the number of Mexican-Americans was disproportionately low, since they were concentrated at the lower end of the economic scale." *Id.* at 1278 n.11.

majority is practicing benevolent discrimination in favor of a traditionally disfavored minority."[275] Thus, *Castaneda* would seem to be limited to the situation in which a former "discrete and insular" minority obtains control of a community and continues inexplicably to discriminate against itself. Because the Court concluded that the discrimination retains its suspect character,[276] this case does not cut deeply into the essence of the proposed test.[277]

In recent years, the Court has seemed willing to scrutinize discriminatory statutes for evidence of a nondiscriminatory purpose in cases involving alienage, which is regarded as "suspect,"[278] and illegitimacy, which is not so regarded.[279] To be sure, the Court has not always confined itself to "objective evidence,"[280] nor has it used the standard of "sufficient to render it probable that the discriminatory effect was merely an incidental adjunct to the legitimate nondiscriminatory purpose." However, the Court does appear to be searching for something approximating this standard.

This proposal is not a Ouija board for equal protection questions. Reasonable people will reach different results under it. Indeed, the author's application of the test to *In re Griffiths* led to a different result than that reached by the Court, even though the Court's approach approximated the proposed test as closely as it ever has.[281] Nevertheless, since the proposed test focuses on those questions, and only those questions, that ought to be relevant to an equal protection inquiry, it should be adopted.

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275. *Id.* at 1282 n.20.

276. *Castaneda* did not involve a question of whether the discrimination was permissible, but whether there was discrimination at all. Although the question of what constitutes discrimination is beyond the scope of this article, *see* note 2 *supra*, *Castaneda* is nevertheless relevant to the issue of the circumstances under which discrimination is justified.

277. In view of the division of the Justices in Regents of the University of California v. Bakke, 98 S. Ct. 2733 (1978), it is difficult to assess whether the case should be read as rejecting the proposed test.

278. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973), *discussed in* text accompanying notes 161-66 *supra*. *But see* Foley v. Connelie, 98 S. Ct. 1067 (1978), *discussed in* text accompanying notes 170-71 *supra*.

279. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977), *discussed in* text accompanying notes 125-27 *supra*.

280. *Id.*

281. 413 U.S. 717 (1973), *discussed in* text accompanying notes 165-69 *supra*.